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An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms

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AN ANALYTICAL FRAMEWORK FOR THE APPLICATION OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

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I. INTRODUCTION

In *R.* v *Big M Drug Mart Ltd.*[1] and *R.* v *Oakes*,[2] the justices of the Supreme Court of Canada developed an analytical framework within which to approach cases arising for decision under the *Canadian Charter of Rights and Freedoms*.[3] In this paper I describe and discuss the broad outlines of this analytical framework.

Chief Justice Dickson wrote the majority decisions in both *Big M* and *Oakes*.[4] The language he used suggests that the justices of the Supreme Court intended judges applying the *Charter* to embrace judicial activism and readily invalidate legislation in order to protect the rights and freedoms guaranteed by the *Charter*. I argue, however, that the doctrine making up the analytical framework is neither determinate nor determinative of judicial decisions, and therefore that the framework dictates neither activism with a view to protecting the *Charter* rights and freedoms, nor

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[1](1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M* cited to D.L.R.].

[2](1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to D.L.R.].

[3]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[4]In *Big M*, Beetz, McIntyre, Chouinard and Lamer JJ. concurred with Dickson J. Wilson J. agreed in the result but wrote separate reasons. Ritchie J. participated in the hearing but took no part in the judgment. The hearing took place before, and judgment was announced after, Dickson J. was appointed Chief Justice; however, I shall refer to Dickson J. as Chief Justice with respect to this decision.

In *Oakes*, Chouinard, Lamer, Wilson and Le Dain JJ. concurred with Dickson C.J. Estey J. (McIntyre J. concurring) wrote separate reasons.

restraint with a view to showing deference to the will of legislative majorities. Accordingly, judges of the Supreme Court and of lower courts may invoke the analytical framework to justify either judicial activism or judicial restraint.

When I say that the doctrine making up the analytical framework is neither determinate nor determinative of decisions, I mean that it is uncertain in its application and does not serve to control the decisions of judges. The framework indicates the range of issues judges are to consider and the sorts of questions judges are to ask when applying the *Charter*. However, it does not dictate what answers judges must give to the questions they ask; nor does it dictate whether judges uphold or invalidate the legislation challenged in individual cases.

I do not intend to suggest that the justices of the Supreme Court should have or could have developed determinative doctrine that does control decision making, either their own or that of lower court judges. Rather, I suggest that in adjudication under the *Charter*, judges are led to the conclusions they reach as much by their choice of values and their choice of role, that is their choice whether to adopt judicial activism or restraint, as by the doctrine they invoke.

The judicial tradition within which Canadian judges work encourages judges to justify their decisions formally in terms of rules. For this reason, Canadian judges often write reasons for judgment that give the impression that doctrine plays a larger part in adjudication than do the other two factors I have mentioned. However, as rules are stated in general language and are applied to particular facts, or in *Charter* cases to particular laws, judges may apply rules in more than one way, and so may reach more than one conclusion in an individual case. Therefore, the rules do not determine the conclusions.

The discretion, leeway, or freedom in judicial decision making can not be eliminated by encouraging judges to base their decisions on policy. Statements about policy, like rules of law, are couched in general language and are capable of various applications to particular facts and statutes.

These are some of the assumptions I make in writing this paper. I neither attempt to justify an approach based on these assumptions, nor cite authority for it, for to do so would require a

paper with a different focus from the one I have written. I note, however, that the approach has a long history in North American jurisprudence, and that elements of it were advanced in one form or another by at least some legal realists[5] and judicial behaviouralists.[6]

Applying these assumptions about the nature of constitutional adjudication, I argue that at each step of the analytical framework developed by the justices of the Supreme Court to govern the application of the *Charter*, the rules are not determinative of decision making; that judges have leeway in applying the rules and doctrines; that judges may engage in result-oriented decision making so that the results they wish to achieve determine how they apply the doctrine, and that judges may manipulate the doctrine in order to justify conclusions they reach on the basis of their choice of values and their perception of the role that it is appropriate for judges to play in constitutional adjudication. Again, I do not mean to suggest that judges should not have the leeway that enables them to manipulate doctrine and engage in result-oriented decision making. These are irreducible elements of judicial decision making.

The Supreme Court has indicated that *Charter* analysis takes place in two stages.[7] First, judges are to consider whether an impugned legislative provision "limits" a right or freedom. Second, if the first question is answered in the affirmative, judges are to consider whether the limit is valid under section 1 of the *Charter* (unless they hold that it is the sort of limit that may not come within section 1). I discuss the analysis in two parts that correspond to these two inquiries, although I argue that the two are not as

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[5]W.E. Rumble, *American Legal Realism*, (Ithaca, New York: Cornell University Press, 1968) c. 2.

[6]S.R. Peck, "A Behavioural Approach to the Judicial Process: Scalogram Analysis" (1967) 5 Osgoode Hall L.J. 1 at 1-4.

[7]*Oakes*, *supra*, note 2 at 223-24. As the Chief Justice noted, the justices "separat[ed] the analysis into two components" in *Big M*, *supra*, note 1; *Law Society of Upper Canada* v. *Skapinker* (1984), [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161 [hereinafter *Skapinker* cited to S.C.R.], and *Hunter* v. *Southam Inc.* (1984), [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 [hereinafter *Hunter* cited to D.L.R.].

In *Hunter*, the hearing took place before, and judgment was announced after, Dickson J. was appointed Chief Justice; however, I shall refer to Dickson J. as Chief Justice with respect to this decision.

separate and self-contained as the judges of the Supreme Court have suggested.

In the first part of the paper, I discuss the first stage of the analytical framework in which judges determine whether an impugned legislative provision limits a right or freedom. This is divided into two sections. In the first section, I consider the process of defining the rights and freedoms; this entails a discussion of the purposive approach to definition and of the relationship between defining and balancing. In the second section, I consider the process by which judges assess an impugned enactment. This section contains a discussion of purposes and effects, and a consideration of the concept of a limit of the sort that may not came within section 1. In the second part of the paper, I discuss the second stage of the analytical framework which is the section 1 analysis. This contains a treatment of the section 1 standard of justification, the onus of proof in the section 1 analysis, the requirement that a limit be prescribed by law, the requirements of reasonableness and demonstrable justification which call for an analysis of the purposes, means, and effects of challenged legislation, and concluding comments on section 1.

II. THE FIRST STAGE OF *CHARTER* ANALYSIS: DETERMINING WHETHER A LEGISLATIVE PROVISION LIMITS A RIGHT OR FREEDOM

The first question judges examine is whether an impugned legislative provision limits a right or freedom guaranteed by the *Charter*. Whether a provision does so depends on two factors, the scope of the right or freedom, and the nature of the provision. To determine whether a legislative provision limits a *Charter* right or freedom, a justice defines the scope or content of the right or freedom, and assesses the legislative provision to determine whether by its purposes or effects it limits the right or freedom as the latter has been defined.

A. *Defining the Rights and Freedoms*

1. The purposive approach

The justices of the Supreme Court have indicated that in their approach to the *Charter* they will bear in mind the special features which distinguish a constitution from an ordinary statute. A constitution is the fundamental document in the political structure of a nation; it allocates legislative authority and limits that authority in order to protect the values fundamental to society. As a constitution is intended to endure, and as amendment of a constitution is difficult, judges must interpret a constitution broadly so that it remains meaningful in a changing society. In *Hunter* v. *Southam*, Dickson C.J., speaking for the Court, used the following language:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one."[8]

The Chief Justice indicated that because the *Charter* has special status as a constitutional document, judges are to give it a broad, purposive, generous interpretation not a narrow and technical

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[8] *Hunter*, *ibid.* at 649.

interpretation.[9] Judges are to interpret specific provisions of the *Charter* "in the light of its larger objects."[10]

In *Big M*, Dickson C.J. returned to the theme he had explored in *Hunter* v. *Southam* that the *Charter* is a "purposive document" whose purpose is "to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms...."[11] In a brief but important passage in *Big M*,[12] he developed a three-part "purposive" approach to the definition of a *Charter* right or freedom.

First, he said, "[t]he meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood ... in the light of the interests it was meant to protect."

Second, to determine the purpose of a right or freedom, judges are to consider four factors: (i) "the character and the larger objects of the *Charter* itself," (ii) "the language chosen to articulate

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[9] *Ibid.* at 649-50. Dickson C.J. referred to *Re Section 24 of B.N.A. Act* (1929), [1930] 1 D.L.R. 98 (P.C.) in which Viscount Sankey referred to the British North America Act as "a living tree capable of growth and expansion within its natural limits," which should be given a "large and liberal" not a "narrow and technical" interpretation. He also referred at 650 to the statement of Lord Wilberforce in *Minister of Home Affairs* v. *Fisher* (1979), [1980] A.C. 319 that the Bermudian Constitution (which incorporates a Bill of Rights) should be given "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to." He also referred to *M'Culloch* v. *State of Maryland* (1819), 17 U.S. (4 Wheaton) 316 as support for a "broad purposive analysis."

See also Estey J. in *Skapinker, supra*, note 7 at 365-68, cited by Lamer J. in *Reference Re Section 94(2) of the B.C. Motor Vehicle Act* (1985), [1985] 2 S.C.R. 486 at 502, 24 D.L.R. (4th) 536 at 549 [hereinafter *B.C. Motor Vehicle Reference* cited to S.C.R.].

[10] *Hunter, supra*, note 7 at 650.

[11] *Ibid.* at 650. Following *Hunter*, Le Dain J. invoked the purposive approach in *R.* v. *Therens* (1985), [1985] 1 S.C.R. 613 at 641.

[12] *Supra*, note 1, at 359-60. The passage reads as follows:

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter* et al. v. *Southam* Inc. ... this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

(...continued)

the specific right or freedom," (iii) "the historical origins of the concepts enshrined," and (iv) "where applicable ... the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*."

Third, the definition of a right or freedom should be "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection." The Chief Justice tempered this statement, however, with the assertion that judges should not "overshoot the actual purpose of the right or freedom"; he suggested that this "overshooting" may be avoided by recalling that "the *Charter* was not enacted in a vacuum and must ... be placed in its proper linguistic, philosophic and historical context."

In a number of cases, justices of the Supreme Court have applied elements of the purposive approach when defining the rights and freedoms in the *Charter*. In *Big M*,[13] Chief Justice Dickson noted the historical origins of freedom of conscience and religion in post-Reformation Europe. He reasoned that freedom of individual conscience is central to such *Charter*-protected values as human worth and dignity, and the functioning of democratic political institutions. He noted[14] that a free society is characterized by diversity of beliefs and conduct, equality with respect to the

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(continued...)

> In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in Southam emphasized, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada* v. *Skapinker* ... illustrates, be placed in its proper linguistic, philosophic and historical contexts.

This passage is quoted, in part, in the *B.C. Motor Vehicle Reference*, *supra*, note 9, at 499-500 and in *Oakes*, *supra*, note 2 at 212.

[13] Big M, *ibid.* at 360-61. See also 353-54.

[14] *Ibid.* at 353-54.

enjoyment of fundamental freedoms, and the absence of coercion. He referred, too, to the concern evidenced by section 27 of the *Charter* for the multicultural heritage of Canadians.[15] In the context of the *Charter* purposes and the historical background to which he referred, he defined freedom of conscience and religion to include religious and conscientious belief, the expression of religious belief and non-belief, and the right to participate in or refuse to participate in religious practice.[16] Defined in this way, the freedom is limited by section 4 of the *Lord's Day Act*[17] prohibiting the conduct of business on Sunday.

In *Hunter* v. *Southam*,[18] when defining the section 8 right to be secure against unreasonable search or seizure, Dickson C.J., after considering the common law history of the right, concluded that one of the purposes of section 8 is the protection of a privacy interest. To achieve this purpose it is necessary to prevent unjustified searches before they take place. Therefore, he defined a reasonable search and seizure as one that is conditioned on prior authorization by an officer capable of acting judicially.

In *Oakes*,[19] the Chief Justice defined the right to be presumed innocent until proven guilty, contained in section 11(d) of the *Charter*, in the light of the objective of the right which is to protect the "fundamental liberty and human dignity" of persons accused of criminal conduct. The right is "essential in a society committed to fairness and social justice." After some reference to the history of the right at common law and in international human rights documents, he defined the right as requiring the state to bear the burden of proving guilt beyond a reasonable doubt in accordance with lawful procedures and fairness. Defined in this way, the right is limited by the reverse onus provision challenged in *Oakes*.

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[15] *Ibid.* at 354-55.

[16] *Ibid.* at 361-65.

[17] R.S.C. 1970, c. L-13.

[18] *Supra*, note 7 at 650-53.

[19] *Supra*, note 2 at 212-13.

In the *B.C. Motor Vehicle Reference*,[20] Lamer J. stressed that he was using the purposive approach to define the meaning of the words "principles of fundamental justice" in section 7 of the *Charter*. Using the language of the purposive approach, he considered the language and structure of section 7, the interests the section was intended to protect which he identified as life, liberty and security of the person, the context in the *Charter* in which the words appear which he identified as sections 8 to 14 and the history of the words which he said is "shrouded in ambiguity." Finally, he referred to the principles of fundamental justice as being "essential elements of a system ... founded upon a belief in the dignity and worth of the human person and the rule of law." He concluded that if section 7 is to give to life, liberty and security of the person protection as great as that given by sections 8 to 14, the words "principles of fundamental justice" must be defined to include not only procedural guarantees but also substantive guarantees.

The purposive approach adopted by the justices of the Supreme Court for the definition of *Charter* rights and freedoms has a number of attractive features. Perhaps the most important of these is that judges applying the purposive approach may not rationalize the meanings they give to the rights and freedoms in terms of technical legal analysis. Judges applying the purposive approach must discuss values, social needs, competing interests and policy alternatives. A discussion of these matters is likely to reflect the real reasons for judges' decisions more clearly than a discussion of technical, legal matters.

By requiring a discussion of values and policies rather than technical analysis, the purposive approach encourages judges to direct their thinking to the social and political concerns affected by the application of the *Charter*. Judges are encouraged to develop a notion of the good society which reflects a conception of the nature of individual rights and the legitimate exercise of power by legislative majorities. The elaboration of the values protected by the *Charter* will reflect a conception of the nature of man, the nature of society, and the proper relationship between the two. However, it is unlikely that a fully developed political philosophy

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[20] *Supra*, note 9 at 499-503 and 511-12.

will evolve in the jurisprudence. The process of judicial review is characterized by judicial responses to discrete issues over a period of time by different justices under pressure of heavy workloads and public expectations of expeditious decision making. These characteristics are not likely to produce a view of individual and society cut of whole cloth. It is likely that even after many years of decision making under the *Charter*, no fully developed view of the good society will emerge, but rather a number of partial views adopted by different judges at different periods of time.

The development of a policy-oriented jurisprudence resulting from the application of the purposive approach will bring home the policy-making role of judges not only to judges and lawyers, but also to academics, the press, politicians, and the public. This will draw attention to the question of the legitimacy of judicial decision making under the *Charter*; that is, to the question whether it is legitimate that in a democracy important policy decisions having the broadest social, political and perhaps economic implications are made by non-elected justices with power to review the policy decisions of elected legislative majorities.

The use of the purposive approach will result in the development in Canada of a literature, made up of judicial decisions and academic writing, which focuses on a policy analysis of civil liberties issues. This will likely lead to an increased awareness of civil liberties issues among lawyers, academics, the press, politicians, and the public.

Finally, the development of a policy-oriented jurisprudence in *Charter* decisions may encourage the development of a policy-oriented jurisprudence in other areas of law. Judges who articulate their *Charter* decisions in terms of policy analysis that touches on social, political and economic issues rather than in terms of technical analysis may be encouraged to adopt a similar approach in decisions in other areas of law. The adoption of the purposive approach in *Charter* decisions may move Canadian jurisprudence away from the "formal style" and toward the "grand style" of judicial decision making.[21]

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[21]K.N. Llewellyn, *The Common Law Tradition: Deciding Appeals*, (Boston: Little, Brown and Co., 1960) at 35-40.

For these reasons the development of the purposive approach is to be welcomed. However, an assessment of the approach must consider what effect it has when judges apply it in the process of defining the rights and freedoms. Considered from that point of view, the purposive approach is indeed no more than an *approach.* It indicates the sorts of issues judges should consider when defining the content of the rights and freedoms. However, the purposive approach does not control the definitions judges adopt in the sense that it does not dictate what those definitions must be. Because the purposive approach is not determinative of decisions, judges may manipulate the approach to justify definitions they adopt on the basis of their choice of values and policies. To say this is not to criticize the purposive approach or to suggest that there is some better technique that might be adopted when defining the rights and freedoms. Rather, it is to recognize the fact that an irreducible element of judicial decision making is the making of decisions, and that this involves choice based on values and policy preferences.

Underlying the purposive approach, there is a recognition that defining the rights and freedoms contained in the *Charter* is neither a simple nor a mechanical task. The meaning of the terms of a legislative provision does not inhere in the provision itself. Judges do not discover meaning from the words; they assign meaning to the words. This is particularly true of a document such as the *Charter* which contains very general language relating to abstract concepts used to articulate the nature of the social order and the relationship between the individual and the state.

In some *Charter* decisions, justices of the Supreme Court of Canada explicitly recognized the difficulties encountered when defining terms used in the *Charter.* In *Hunter* v. *Southam,* Dickson C.J., speaking of the words "unreasonable search or seizure" in section 8 of the *Charter,* said, "It is clear that the meaning of 'unreasonable' cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction."[22] In the *B.C. Motor Vehicle Reference,* Lamer J. noted

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[22] *Supra,* note 7 at 649.

that "a single incontrovertible meaning is not apparent" for the phrase "principles of fundamental justice."[23]

The core directive of the purposive approach is that to determine the purposes of a right or freedom, and hence its definition, judges are to consider the "character and the larger objects of the *Charter*," the language used to state the right or freedom, the history of the right or freedom, and the context of the right or freedom in the *Charter*. These factors - purpose, language, history, and context - are central to the well-established "rules" of statutory construction. The notorious fact about these "rules" is that they do not dictate meaning at all, but may be manipulated to rationalize the selection of any one of a number of possible meanings.[24]

Let us consider first the reference to the "character and the larger objects of the *Charter* itself."[25] The character of the *Charter* as a document entrenching rights and freedoms and authorizing judges to prevent legislative abridgement of those rights and freedoms does not of itself indicate the way in which particular rights and freedoms should be construed. With respect to the "larger objects of the *Charter*," we might refer to *Oakes*. There, Dickson C.J. said that the words "free and democratic society" in section 1 indicate that the purpose for which the *Charter* was adopted is to ensure that Canadian society is free and democratic. He listed some of the "values and principles essential to a free and democratic society." These include some values and principles that relate to the interests of the individual -- "respect for the inherent dignity of the human person" and "commitment to social justice and equality"; some that relate to the heterogeneous character of Canadian society --"accommodation of a wide variety of beliefs" and "respect for cultural and group identity"; and some that relate to the processes of parliamentary democracy -- "faith in social and political institutions which enhance the participation of individuals and

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[23] *Supra*, note 9 at 501.

[24] For the classical Canadian critique of the rules of statutory construction see John Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1.

[25] See *supra*, note 12 and accompanying text.

groups in society."[26] We should add to this list the values and principles enunciated in section 27 of the *Charter*, the preservation and enhancement of the multicultural heritage of Canadians.[27]

The values and principles essential to a free and democratic society that the Chief Justice listed in *Oakes* appear to be some of the "larger objects of the *Charter*" that he declared in *Big M* to be reference points in the process of defining the rights and freedoms. As indicated above,[28] in *Hunter*, *Big M*, *Oakes*, and the *B.C. Motor Vehicle Reference* the justices referred to some of these values and principles when they defined the rights and freedoms using the purposive approach.

However, judges will experience difficulty when they attempt to define the rights and freedoms on the basis of these larger objects. An appeal to "human dignity," "social justice," "equality," or "group identity" does not of itself point to a particular definition of a *Charter* right or freedom. The difficulty is that the justices of the Supreme Court have substituted the general language in which they stated the values and principles essential to a free and democratic society, for the general language in which the rights and freedoms are stated in the *Charter*.[29] Because these values and principles are stated in general language, they require definition before they may serve as a guide to the definition of the rights and freedoms. The process of defining the values and principles is as complex as the process of defining the rights and freedoms. Judges with different views about the meaning of the values and principles, may invoke the purposive approach to justify different definitions of the same right or freedom.

There is another factor which suggests that judges will not be directed to a particular definition of a right or freedom by a consideration of the values and principles identified as essential to

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[26] *Supra*, note 2 at 225.

[27] See *Big M*, *supra*, note 1 at 354-55.

[28] *Supra*, text at notes 13 to 20.

[29] Indeed, some of the values and principles, for example social justice, are more general than some of the *Charter* rights, for example, the right to an interpreter.

a free and democratic society. Chief Justice Dickson identified a number of essential values and principles. Two justices attempting to define the same right or freedom may invoke different values and principles to justify different definitions. "Human dignity," "social justice," and "respect for cultural and group identity" may lead in different directions.

Chief Justice Dickson's statement of the purposive approach indicates that the second factor judges are to consider when determining the purposes of a right or freedom is the language in which the right or freedom is stated. Clearly judges should refer to this language. However, the language used to articulate the rights and freedoms is the problem not the solution. With respect to many of the rights and freedoms, the language is so general that it does not indicate the purposes of the right or freedom.[30]

The third factor judges are to consider when determining the purposes of a right or freedom is "the historical origins of the concepts enshrined." This factor includes socio-political history; for example, in *Big M*[31] Dickson C.J. referred to the development of religious liberty in post-Reformation Europe. It also includes the legal history of the right or freedom in statute and case law, not only in Canada and the United Kingdom, but also in other jurisdictions and in international human rights documents. Thus, Chief Justice Dickson referred to the history of religious freedom in Canadian jurisprudence,[32] the history of the presumption of innocence and the requirement of reasonable search and seizure in English common law,[33] the history of religious freedom, search and seizure, and the presumption of innocence under the U.S. Bill of Rights,[34] and the history of the presumption of innocence in the

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[30] See *supra*, text at notes 22-23. The guarantee of a right or freedom in the *Charter*, like a provision of a simple Act of a legislature, may have more than one purpose. See, *infra*, text at notes 82-86 and 163-65. In the text I use language to reflect this, where appropriate.

[31] *Supra*, note 1 at 360-61.

[32] *Ibid.* at 344-48; 362-64.

[33] *Oakes*, *supra*, note 2 at 213; *Hunter*, *supra*, note 7 at 651.

[34] *Big M*, *supra*, note 1 at 348-49; *Hunter*, *ibid.* at 652; *Oakes*, *ibid.* at 220-21.

European Convention for the Protection of Human Rights and Fundamental Freedoms.[35]

It is certainly appropriate to consider the history of a right or freedom to determine the purposes which the guarantee of the right or freedom might serve. However, a consideration of history (like a consideration of the larger objects of the *Charter*) is unlikely to give a precise indication of the purposes of the guarantee. First, it may be difficult to trace the history. In the *B.C. Motor Vehicle Reference*, Lamer J. concluded that the history of the term "fundamental justice" is "shrouded in ambiguity."[36] Second, history may be inconclusive especially as judges are to consider the history of a right or freedom in different jurisdictions. Some historical trends may point to one purpose, and other historical trends to another purpose for the guarantee of a right or freedom. Third, a study of the history of the rights and freedoms is backward looking, and if emphasized leads to definitions of the rights and freedoms which are static and do not take into account changing social conditions and attitudes.

Justices of the Supreme Court have recognized the undesirability of this static quality of historical research with respect to two sorts of historical inquiry. In the *B.C. Motor Vehicle Reference*,[37] Lamer J. held that evidence given before the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada is admissible evidence on the question of the meaning of a right or freedom, but is to be given little weight. One reason Lamer J. gave for this position is that if weight is given to the views of individuals who testified before the Joint Committee, "the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs." Lamer J. concluded that "care must be taken to ensure that historical materials, such as the Minutes of

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[35] *Oakes*, *ibid.*, at 221-22.

[36] *Supra*, note 9 at 512.

[37] *Ibid.* at 504-09.

Proceedings and Evidence of the Special Joint Committee, do not stunt (the *Charter*'s) growth."[38]

Justices of the Supreme Court have also held, in a number of decisions,[39] that when defining the rights and freedoms judges should not follow the definitions adopted in decisions made under the Canadian Bill of Rights.[40] The justices pointed out that the *Charter* is a constitutional document and the Canadian Bill of Rights is a simple Act of the federal Parliament. Further, justices interpreted the Canadian Bill of Rights as recognizing and declaring the rights and freedoms as they existed in 1960, and so defined the rights and freedoms in the Bill in terms of the meanings they had in 1960. The definitions given to the rights and freedoms in the Bill are not applicable to the rights and freedoms in the *Charter* as the latter are not confined to the rights and freedoms as they existed in 1960, or for that matter in 1982.

The judges' rejection of these two elements of history, the testimony of witnesses before the Special Joint Committee and the jurisprudence under the Canadian Bill of Rights, suggests that judges will not always be prepared to accept historical data as a basis for defining the rights and freedoms. This supports the view that history is not a certain guide to the discovery of purpose.

The fourth factor that Dickson C.J. said is useful as an indicator of purpose is context, that is, "the meaning and purpose of the other specific rights and freedoms with which (the right or freedom being defined) is associated within the text of the *Charter*." It is understandable that a judge should look to related rights or

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[38] *Ibid.* at 509. Lamer J. gave other reasons for his conclusion that little weight should be given to this evidence. These include the following: it is wrong to give weight to the views of individuals who testified before the Committee because a "multiplicity of actors" played major roles in the negotiation and adoption of the *Charter*. We cannot assume that the testimony of individuals before the Committee indicates the intention of Parliament and the provincial legislatures at the time the *Charter* was adopted. Indeed, the intention of these bodies is "a fact which is nearly impossible of proof." See 507-09.

[39] *Big M*, *supra*, note 1 at 359; *Oakes*, *supra*, note 2 at 214-17; *B.C. Motor Vehicle Reference*, *supra*, note 9 at 509-11, Lamer J., Dickson C.J. and Beetz, Chouinard and Le Dain JJ. concurring; *Singh* v. *Minister of Employment and Immigration* (1985), [1985] 1 S.C.R. 177 at 209, 17 D.L.R. (4th) 422 at 461-62, Wilson J., Dickson C.J. and Lamer J. concurring; *R* v. *Therens*, *supra*, note 11 at 638-39, per Le Dain J., dissenting on other grounds.

[40] S.C. 1960, c. 44, reprinted in R.S.C. 1970, App. III.

freedoms. However, as the definitions of the related rights and freedoms are themselves uncertain, it is unlikely that a consideration of the related rights and freedoms is sufficient to determine the definition of the right or freedom with which the judge is primarily concerned. Therefore, this fourth factor, like the first three, does not control the process of defining the rights and freedoms.

Finally, the fact that there are four factors that judges are to consider when determining the purposes of a right or freedom, itself adds to the indetermination of the process. A consideration of the "larger objects of the *Charter*" (the values and principles of a free and democratic society) may suggest that a right or freedom has one purpose, and a consideration of the history of the right or freedom may suggest that it has another purpose.

In the third part[41] of the purposive approach, Dickson C.J. said that the definition of a right or freedom should be "generous" in order to fulfil "the purpose of the guarantee" and to give the individual "the full benefit of the *Charter*'s protection"; but it should not be too generous, that is, it should not "overshoot the actual purpose of the right or freedom." He suggested that an overly generous interpretation may be avoided by placing the *Charter* "in its proper linguistic, philosophic and historical contexts."

The direction to be generous when defining the rights and freedoms echoes statements made in several other decisions.[42] It suggests that the Chief Justice intended justices of the Supreme Court and lower courts actively to protect the values underlying the *Charter*. However, as each judge may determine the appropriate degree of generosity, the instruction to be generous does not control the definitions to be adopted for the rights and freedoms. The lack of precision in the instruction is increased by the qualification that the definitions should not be too generous.

The statement relates the degree of generosity to the purposes of a right or freedom; a definition should be broad enough to give effect to the purposes for which a right or freedom is guaranteed, but not broader. This reiterates the central theme of the purposive approach. However, since judges have considerable

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[41] See *supra*, note 12 and accompanying text.

[42] See *supra*, notes 8 and 9, and accompanying text.

leeway when they identify purpose, relating generosity to purpose does not serve to control the notion of generosity.

The statement also relates generosity to the full benefit of the *Charter*'s protection. However, the question, what is the "full benefit of the *Charter*'s protection," is precisely the question that must be answered in the process of interpretation.

The statement suggests, further, that the appropriate degree of generosity may be found by placing the *Charter* "in its proper linguistic, philosophic and historical contexts."[43] This may mean that the scope of a right or freedom should be decided by reference to the language in which the right or freedom is stated, its philosophy, in the sense of purpose, and its history. If the statement means this, it adds little to what has gone before. On the other hand, the statement may mean that judges should consider the language, philosophy, and history of the *Charter* as a whole, as opposed to the language, philosophy (purpose), and history of a particular right or freedom. However, even if this is what was intended it does not control the degree of generosity to be shown in the interpretation of an individual right or freedom.

The linguistic context of the *Charter* must ultimately be reduced to the language used in the *Charter* to state particular rights and freedoms in the context of other rights and freedoms. If this is so, reference to the linguistic context of the *Charter* repeats elements of the purposive approach discussed above.[44]

It may be that the historical context of the *Charter*, too, must be reduced to the history of particular rights and freedoms; if so, reference to the historical context of the *Charter* adds little to what has gone before.[45] On the other hand, Dickson C.J. may be referring to the events in the 1970's and early 80's leading up to the adoption of the *Charter* in 1982. If so, the reference to historical

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[43]But in *Hunter, supra*, note 7 at 649, the Chief Justice speaking of s. 8 of the *Charter* said, "There is no specificity in the section beyond the bare guarantee of freedom from "unreasonable" search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee."

[44]*Supra*, text at notes 22-23 and 30.

[45]*Supra*, text at notes 31-40.

context is a new element. However, as I argue above,[46] history is not likely to be a clear guide to the definition of a right or freedom. In addition to the lack of a single historical explanation of events, history, as a guide to interpretation, suffers from the difficulty noted above that it is static and does not take into account changing social conditions and attitudes.

The philosophic context of the *Charter* may mean no more than "the character and larger objects of the *Charter*" discussed above.[47] If so, the reference to the philosophic context again adds little to the statement of the purposive approach. If the reference to the philosophic context was intended to encompass something different, it is not clear what this is. Is the philosophic context one of individual rights, group rights or societal rights? There are elements in the *Charter* to support each of these positions. On the other hand, the presence of section 1 in the *Charter* may suggest that the philosophic context is not support for a particular type of rights but a balancing of opposing interests. If that is so, the philosophic context does not indicate how specific balances are to be struck. If the reference to "philosophic context" is intended to suggest that the *Charter* reflects a political philosophy, it is likely that judges will not agree, except in the most general way, what that political philosophy is.[48] Accordingly, reference to philosophic context does not control the degree of generosity to be shown in the interpretation of a particular right or freedom.

I conclude that the purposive approach to the interpretation of the rights and freedoms does not control the process of interpretation. Judges have a great deal of discretion when they determine the meaning of the rights and freedoms, because they may manipulate the doctrine contained in the purposive approach. The articulation of the purposes of a right or freedom is a complex and creative process. Purpose is not an element contained within the statement of a right or freedom which may be discovered by a rigorous search. Purpose is determined by creative choices made by

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[46] *Supra*, text at note 36.

[47] *Supra*, text at notes 25-29.

[48] See *supra*, text at notes 26-29.

individual judges. The determination of purpose is not controlled by the instruction to consider the larger objects of the *Charter*, language, history, and context because these factors are indeterminate. Finally, the determination of purpose is not controlled by the direction that the rights and freedoms are to be construed generously but not too generously.

2. The relationship between defining and balancing

The Supreme Court's decision to adopt a purposive approach to the definition of the rights and freedoms calls for a consideration of the relationship between the process of defining a right or freedom and the process of balancing a right or freedom against other interests. In the section 1 analysis, judges balance the values underlying the rights and freedoms against competing values that legislatures seek to pursue in legislative provisions. They do this by considering whether the competing values are sufficiently important to justify placing a limit on a right or freedom.[49] Judges also balance values when they define a right or freedom. This is perhaps especially true when judges adopt a purposive approach to the definition of a right or freedom. I shall refer to the balancing that takes place in the process of defining a right or freedom as "definitional balancing"[50] to distinguish it from the balancing that takes place in the section 1 analysis.

A judge using the purposive approach who wishes to define a guaranteed right or freedom as broadly as possible may do so by holding that the purpose of the guarantee is to protect all values that may conceivably be related to the right or freedom, and all behaviour that may reflect those values. For example, a judge may hold that the purpose of the guarantee of freedom of expression is to protect all values that may be achieved through expression including individual self-fulfillment, the search for knowledge, participation in the democratic process, and the efficient working of

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[49]See generally the discussion of the s. 1 analysis, *infra*.

[50]See Thomas I. Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, Vintage Books, 1967) at 53-62 for a discussion of definitional balancing and ad hoc balancing.

the commercial market place.[51] The judge will hold that freedom of expression includes all expression, including the four types of expression which reflect those values - artistic expression, scientific expression, political expression, and commercial expression.

However, the purposive approach does not always lead judges to adopt the broadest possible definition of a right or freedom. If the approach did so, it would be unnecessary; judges may adopt the broadest possible definition without reference to purpose. The purposive approach contemplates that judges may hold that the purpose of a right or freedom is to protect some but not all values that may be related to the right or freedom. If a judge decides, for example, that the sole purpose of freedom of expression is to facilitate the functioning of democratic institutions, the judge will define freedom of expression to include political expression, but not expression directed to other purposes, such as artistic and commercial expression.

In the passages in *Hunter* and *Big M* in which the purposive approach is developed,[52] there is a suggestion that a purposive approach must lead to a broad definition of a right or freedom, and a technical, legalistic approach must lead to a narrow definition. However, a legalistic approach, one that focuses on a technical application of legal concepts and rules, may lead to a broad definition; and, as the example given above illustrates, a purposive approach may lead to a narrow definition. A purposive approach leads to a narrow definition when judges applying the approach hold that the purpose of the guarantee of the right or freedom is to protect some but not all values that may be related to the right or freedom.

If judges applying the purposive approach define freedom of expression to include political but not commercial expression, they are both defining freedom of expression and balancing values. The choice of definition amounts to value balancing because it determines that the values related to political expression are to be preferred to all other values that government may pursue in

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[51] *Ibid.* at 3-15. Emerson does not refer to the fourth value listed in the text; he discusses an additional value - - maintaining a balance between social stability and change.

[52] *Supra*, notes 8-12 and accompanying text.

legislation unless government brings its legislation within section 1, but that the values related to commercial expression are not to be preferred to any other values government may choose to pursue.

Some of these considerations are illustrated in *Re Klein and Law Society of Upper Canada*[53] in which the Ontario Divisional Court was called upon to decide whether freedom of expression includes commercial expression.[54] Callaghan J., speaking for the majority, adopted a purposive approach to the definition of freedom of expression. He rejected as "a literal and purposeless interpretation of the *Charter*" the view that judges should define freedom of expression to include all expression and should consider limits (that is, balance values) only under section 1.[55] In a discussion that shares with the Chief Justice's decision in *Big M* a focus on history, the features of a democratic society, and the context provided by other parts of the *Charter*, Callaghan J. referred to pre-*Charter* decisions that he regarded as extending protection to political but not commercial expression,[56] the importance of political expression in a democratic society[57] and the concern of the *Charter* with political rights but not with economic matters.[58] His conclusion that freedom of expression includes political but not commercial

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[53](1985), 50 O.R. (2d) 118, 16 D.L.R. (4th) 489 (Div. Ct) [hereinafter *Klein* cited to D.L.R.].

[54]The applicants sought an order declaring the invalidity of rules, commentaries and decisions of the Law Society of Upper Canada which severely restricted the extent to which lawyers in Ontario might advertise the fees they charged for their services. *Ibid.* at 496 and 524-26.

[55]*Ibid.* at 530 and 537-38.

[56]*Ibid.* at 531. He referred to *Reference Re Alberta Statutes* (1938), [1938] S.C.R. 100, [1938] 2 D.L.R. 81, aff'd (1938), [1939] A.C. 117, [1938] 4 D.L.R. 433 and *Gay Alliance Toward Equality* v. *Vancouver Sun* (1979), [1979] 2 S.C.R. 435, 97 D.L.R. (3d) 577 [hereinafter *Gay Alliance* cited to D.L.R.].

[57]*Klein, ibid.* at 532-33.

[58]*Ibid.* at 532.

expression[59] illustrates that the purposive approach may yield a narrow definition of a right or freedom.

Henry J., who dissented, rejected Justice Callaghan's narrow definition of freedom of expression. He also expressed a view of the processes of defining and balancing that differs from that of Callaghan J. and from that underlying the purposive approach. This alternative view of the relationship between defining and balancing insists that judges should define the rights and freedoms as absolutes, and balance values only under section 1. Accordingly, this alternative view is applicable only to the fundamental freedoms[60] and to the rights that are stated in the *Charter* in unqualified terms. It is not applicable to the rights that are qualified in the *Charter* by words such as "reasonable," for example, the right to be secure against unreasonable search or seizure, as qualified rights may not be defined as absolutes.[61] The alternative view of the relationship between defining and balancing under the *Charter* may be outlined as follows.

Judges should define as absolutes the unqualified rights and the fundamental freedoms because the unqualified rights and the fundamental freedoms are stated in the *Charter* as absolutes. It is true that even the unqualified rights and the freedoms cannot be treated as absolutes; legislatures may limit these rights and the freedoms in order to pursue competing values. The *Charter* makes explicit provision for this in section 1. If the *Charter* did not contain section 1, judges would define the unqualified rights and the freedoms as less than absolute in order to permit legislatures to

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[59] *Ibid.* at 532 and 539. At 532 he left open the question whether freedom of expression includes artistic expression.

[60] I assume in the statement in the text that s. 2(c) of the *Charter* is an absolute guarantee of freedom of peaceful assembly. I recognize, however, that s. 2(c) may be regarded as a qualified guarantee of freedom of assembly.

[61] Nevertheless, the alternative view was advanced in *Re Soenen* (1983), 3 D.L.R. (4th) 658, [1984] 1 W.W.R. 71 (Alta. Q.B.) [hereinafter *Soenen* cited to D.L.R.], in which McDonald J. considered qualified rights, namely the s. 12 right not to be subjected to any cruel and unusual treatment or punishment, and the s. 8 right to be secure against unreasonable search or seizure.

Notwithstanding the statement in the text, it is arguable that the alternative view of the relationship between defining and balancing is applicable to unqualified aspects of the qualified rights.

Examples of sections of the *Charter* that grant qualified rights include ss 8, 9, 10(a) and (b), 11(a), (b), (d) and (e) and 12.

limit them. Judges in the United States define the rights and freedoms guaranteed in the United States Bill of Rights as less than absolute as the United States Bill of Rights does not contain a section similar to section 1. However, it is not appropriate for Canadian judges to limit the unqualified rights and the freedoms by definition; to do so is to diminish the effect of section 1 which explicitly states the only grounds on which the unqualified rights and the freedoms may be limited. The structure of the *Charter* indicates that judges should define the unqualified rights and the freedoms as absolutes, and balance values only under section 1.[62]

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[62]See *Klein*, *supra*, note 53 at 498-503. In this passage, Henry J. spoke of the freedoms, but not of the rights. He held that freedom of expression includes commercial expression, that the Law Society rules, commentaries and decisions limit freedom of expression and that the limit is not within s. 1 of the *Charter*. See 511.

In *Soenen*, *supra*, note 61 at 666-67, McDonald J. used the following language (which forms part of a longer passage adopted by Henry J. in *Klein* at 502):

> In the absence, in the U.S. *Bill of Rights*, of such a clause as the last part of s. 1, it is not surprising that American courts have, in regard to the rights protected by the *Bill of Rights*, found it necessary to limit them by judicial construction.... The American courts have done what was obviously necessary, for each of the rights protected by the *Bill of Rights* could not, realistically, be applied in absolute terms; a balancing of individual interests against the collective needs of society was necessary....
>
> However, the presence of s. 1 in our *Charter* dictates a different approach.... [I]t seems to me that the rights and freedoms guaranteed by the *Charter* must, before any application of the limiting part of s. 1, be interpreted in an absolute sense that does not involve the application of any judicially-created criterion designed to limit the scope of judicial review. It is only when the limiting part of s. 1 is invoked and applied that any issue of balancing of individual interests against those of the collectivity, or any other such judicially-created limiting device, comes into play. If it were otherwise, that is, if the guaranteed rights were themselves relative in their content, s. 1 would be redundant. Moreover, the framers of the *Charter* having taken the care in s. 1 to articulate the grounds on which the guaranteed rights and freedoms may lawfully be limited, it would be presumptuous for Canadian judges to develop other grounds on which those rights and freedoms might be limited.

Notwithstanding this statement, McDonald J. appears to have balanced values (the inmate's interest in privacy and visiting rights against the institution's interest in security) when he determined that the institution did not limit the inmate's s. 12 right not to be subjected to cruel and unusual punishment. See 671-73. Having determined that there was no limit on the right, McDonald J. did not proceed to a s. 1 analysis. Query whether this is consistent with the position stated in the quoted passage on the ground that the right in s. 12 is not absolute. Or does consistency with the stated position require the holding that the institution limited the right, and a s. 1 analysis to balance values?

See also P. Anisman, "Application of the Charter: A Structural Approach" in P. Anisman and A.M. Linden, eds., *The Media, the Courts and the Charter* (Toronto: Carswell, 1986) 1 at 12-19; P.A. Bender, "Justifications for Limiting Constitutionally Guaranteed Rights and Freedoms: Some Remarks about the Proper Role of Section One of the Canadian Charter" (1983) 13 Manitoba L.J. 669 at 673, 676, 678.

There are, then, two techniques judges may use when defining the rights and freedoms, and balancing the values underlying the rights and freedoms against other values. One technique uses both definitional balancing and balancing under section 1. It begins with the purposive approach to definition. Judges, applying the purposive approach, define a right or freedom (for example, freedom of expression) by determining that its purpose is to protect some values (participation in the democratic process), but not others which it may conceivably protect (the efficient working of the commercial market place). On this basis, judges adopt a definition that is not as broad as it might be, for example, a definition of freedom of expression that includes political but not commercial expression. By adopting a narrow definition, judges reduce the range of cases in which they will find that an enactment limits a right or freedom, and so they reduce the range of cases in which they must undertake a section 1 analysis. For example, having defined freedom of expression as indicated, judges will hold that an enactment prohibiting political expression limits freedom of expression, and they will undertake a section 1 analysis to balance values in order to determine whether the limit is valid. However, on the basis of this definition, judges will hold that legislation prohibiting commercial expression does not limit freedom of expression; because there is no limit, the legislation is valid and the judges will not proceed to a section 1 analysis. Thus, in our example, judges considering legislation prohibiting commercial expression, balance values in the process of defining the scope of the freedom without resort to section 1. It is only when considering legislation prohibiting political expression that they balance values under section 1.

The second technique is applicable only to the rights that are stated in the *Charter* in unqualified terms and to the fundamental freedoms. It draws a sharp distinction between the process of defining and the process of balancing. Under this technique judges define as absolutes the unqualified rights and the freedoms. Therefore, the definitional process does not include balancing values, except in the sense that a general preference is given to values underlying these rights and the freedoms. Because the definitions are broad, judges will more frequently find that legislative provisions limit these rights and the freedoms and,

therefore, will more frequently proceed to the section 1 analysis to balance competing values. Balancing will take place entirely under section 1. This technique does not fit well with the purposive approach to definition because defining the unqualified rights and the freedoms as absolutes does away with the need for an inquiry into purpose. However, this technique gives full effect to section 1 of the *Charter*.

In both definitional balancing and balancing under section 1, judges balance the values underlying rights and freedoms against competing values legislatures seek to pursue. Nevertheless, there are differences between the two types of balancing. The work of Thomas I. Emerson on the legal doctrine developed by U.S. judges in freedom of speech decisions, sheds some light on these differences.[63]

When judges use definitional balancing they develop general rules of law defining the scope of the rights and freedoms. When judges balance under section 1, they are doing what Emerson calls *ad hoc* balancing.[64] They do not state a general rule of law, but rather decide whether the particular limit contained in the particular enactment under review is reasonable and demonstrably justified in the particular circumstances of the case. Assume, for example, that justices of the Supreme Court of Canada consider the issue that arose in *Klein*,[65] and hold that the Law Society rule restricting price advertising by lawyers is valid. Using definitional balancing, the justices state the rule that the protection afforded by the guarantee of freedom of expression does not extend to commercial expression.

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[63] *Supra*, note 50 at 53-62. Professor Emerson discussed definitional balancing in the context of the "absolute" test for freedom of speech. The test directs judges to define freedom of speech and to give absolute protection to the freedom as defined. Professor Emerson prefers definitional balancing to *ad hoc* balancing because in his view (1) judges using definitional balancing balance values less extensively than judges using *ad hoc* balancing; (2) judges using definitional balancing perform a judicial function (defining language and developing rules of law) which may be distinguished from the legislative function (balancing values), and (3) definitional balancing in the context of the "absolute" test recognizes that the Bill of Rights itself strikes a balance of values, and gives more protection to First Amendment freedoms than does *ad hoc* balancing. Professor Emerson recommended that judges deciding First Amendment cases use only definitional balancing.

[64] *Ibid.* at 53-56.

[65] *Supra*, note 53. See also note 54.

Alternatively, defining freedom of expression as an absolute and balancing under section 1, the justices determine that the particular Law Society rule is reasonable and demonstrably justified in the circumstances of the case. The decision based on section 1 balancing is *ad hoc* in the sense that it is unique to the particular limit in the particular circumstances considered by the justices. It does not lay down a general rule of law about the degree of protection afforded to commercial expression, nor even, perhaps, about the validity in general of rules restricting price advertising by lawyers.

Another difference between definitional balancing and balancing under section 1 relates to the level of abstraction at which the balancing takes place. Under definitional balancing judges balance values at a high level of abstraction; in the *Klein* example, they consider whether the values underlying commercial expression of all sorts ought to be protected against all other values which legislatures may pursue in legislation. In *ad hoc* balancing under section 1, judges balance the values that arise in the circumstances of individual cases. In the *Klein* example, they consider whether the values underlying unrestricted advertising by lawyers (commercial expression, competition, informed choice by consumers) are to be preferred to the values underlying the regulation under consideration (professionalism).

What are the implications of the introduction of definitional balancing through the Supreme Court's adoption of the purposive approach? It is arguable that when justices of the Supreme Court use definitional balancing they have more influence on decision making by lower court judges than they have when they balance under section 1. The end result of definitional balancing is the creation of rules of law to which lower court judges (and officials other than judges) may look in later cases. If the justices of the Supreme Court decide that freedom of expression does not include commercial expression, lower court judges should hold, thereafter, that legislation prohibiting or regulating commercial expression may not be challenged under the *Charter*. On the other hand, the end result of balancing under section 1 is not a rule of law, but an *ad hoc* decision which arguably does not provide guidance for judges in later cases. If justices of the Supreme Court hold that the Law Society rule in *Klein*, although a limit on freedom of expression, is

valid under section 1, lower court judges in a later case dealing with a somewhat different regulation of price advertising by lawyers, may hold that the particular regulation before them, in the circumstances before them, is not within section 1 and is therefore invalid.

This reasoning is not entirely convincing. First, it appears to give too much weight to the importance of rules and too little weight to the importance of values and perceptions of the judicial role in *Charter* adjudication. As judges decide more cases under the *Charter*, they will state an increasingly large number of rules in the course of definitional balancing. Lower court judges will have freedom to determine which rule applies in a particular case; further, in the course of applying the rule they select, lower court judges may reshape it, sometimes expanding it and sometimes restricting it in order to give effect to their value choices. Therefore, the decisions of lower court judges will not be tightly controlled by the rules of law stated by Supreme Court judges in the course of definitional balancing. For example, a lower court judge may side-step a Supreme Court holding that commercial expression is not protected by ruling that a legislative provision that appears to limit commercial expression actually limits a type of expression that is protected. In *Klein* itself, Henry J. suggested that price advertising is a form of political expression.[66] Secondly, the reasoning seems to give too little weight to the use that lower court judges may make of Supreme Court decisions based on *ad hoc* balancing if they wish to do so. Judges may look beyond the particulars of a decision based on section 1 and induce general statements about the importance of the government's purposes, the suitability of the means used, and the severity of the effects of the limit on the rights and freedoms.[67] They may use these general statements to guide them in their decisions. In short, lower court judges may derive guidance inductively from Supreme Court decisions based on section 1 balancing, just as they may derive guidance deductively from decisions based on definitional balancing.

As a second implication of definitional balancing, it is arguable that parties relying on the *Charter* will be more successful

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[66] *Supra*, note 53 at 506.

[67] See, *infra*, text at notes 159, 182 and 191.

if judges balance values only under section 1 than they will be if judges use definitional balancing. This argument is based on the view that the rules governing the onus of proof give the party relying on the *Charter* an advantage when judges balance only under section 1. The rules probably[68] impose the onus at the definitional stage of the analysis on the party relying on the *Charter*; the rules clearly impose the onus in the section 1 analysis on the party seeking to uphold a limit.[69]

When judges balance only under section 1, the party relying on the *Charter* has a strategic advantage. The judges begin by assuming that they should define the unqualified rights and the freedoms as absolutes. Therefore, there is little argument at the definitional stage of the analysis; the party relying on the *Charter*, who has the onus of proof at this stage of the analysis, may discharge the onus easily. The judges then move to section 1 to balance values. The major part of the argument takes place in the section 1 analysis, where the onus is on the party seeking to uphold the limit.

On the other hand, when judges use the purposive approach and definitional balancing, the party relying on the *Charter* is at a strategic disadvantage. A major part of the analysis occurs when the judges define the rights and freedoms because they define and balance at the same time. At this definitional stage, the party seeking *Charter* protection likely bears the onus of proof. As this party must persuade the judges to adopt a broad definition of the rights and freedoms, the onus is not easily discharged. If this party fails to discharge the onus, the judges define the rights and freedoms narrowly, hold that the enactment does not impose a limit and do not proceed to the section 1 analysis; that is, they do not proceed to the part of the analysis in which the party seeking to uphold the limit bears the onus.

On this argument, then, the strategic disadvantage suffered by the party relying on the *Charter* if judges use definitional

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[68]The Supreme Court of Canada has not yet explicitly stated which party has the onus of proof at the definitional stage of *Charter* analysis. If an enactment is presumed to be constitutional at this stage of the analysis, the party relying on the *Charter* bears the onus of proof.

[69]See *infra*, text at note 129. See also Anisman, *supra*, note 62 at 13-14.

balancing will lead judges to give less protection to the unqualified rights and the freedoms than they will do if they balance only under section 1. This assessment of the different results likely to flow from the two approaches to definition and balancing is not persuasive. It assumes that technical legal considerations - the rules governing the onus of proof - are likely to be more influential in *Charter* litigation than the judges' assessments of the policy issues and of the desirability of activism or restraint. If one holds the view that the latter two factors are more significant than the former, one will conclude that judges motivated by those two factors will manipulate the technical, legal considerations in a way that will achieve the results they desire.

I have argued that the Supreme Court's adoption of the purposive approach to definition has implications not only for the process of defining rights and freedoms but also for the process of balancing values. The justices of the Supreme Court did not, in *Big M*, explicitly recognize or discuss the impact of the purposive approach on the process of balancing values. In *Oakes*, Dickson C.J. stressed that section 1 is the sole criterion for limiting the rights and freedoms (other than section 33).[70] It is precisely this feature of section 1 that suggests that the unqualified rights and the freedoms should be defined as absolutes. If they are defined as less than absolute they are limited without reference to section 1. In *Oakes*, too, Dickson C.J. stated that the two stages of *Charter* analysis (first, determining whether an enactment limits a right or freedom and, second, determining whether the limit is within section 1) are to be kept separate.[71] However, if the unqualified rights and the freedoms are defined as less than absolute, the process of defining them in the first stage of the analysis includes balancing values, which is the major judicial task in the second stage of the analysis. Further, as the *qualified* rights may not be defined as absolutes, the process of defining them also includes balancing values. For these reasons, the two stages of *Charter* analysis are not separate and distinct.

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[70] *Supra*, note 2 at 224-25.

[71] *Supra*, note 7.

B. *Assessing a Legislative Provision*

1. Purposes and effects

After judges define the right or freedom at issue in a case, they must assess the challenged legislative provision to determine whether it imposes a limit on the right or freedom as the latter has been defined. In this assessment, judges consider the purposes and effects of the legislative provision. The provision limits the right or freedom if (a) one of the legislature's purposes when it enacted the provision was to limit the right or freedom, or (b) an effect of the provision is to limit the right or freedom even if the legislature's purpose was not to limit. If judges determine that the legislative provision limits a right or freedom, they proceed to the section 1 analysis to consider whether the limit comes within section 1. An exception to this last statement is the case of a limit of the sort that may not come within section 1, and this is discussed below.[72]

In developing this position in *Big M*, Dickson C.J. rejected the argument that judges should look only to the effects of a provision to determine whether the provision violates a right or freedom.[73] He summarized his position as follows:

> In short, I agree with the respondent that the legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.[74]

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[72] *Infra*, text at notes 99-119.

[73] *Supra*, note 1 at 350-52. In this passage, Dickson C.J. spoke of purpose in the singular form and of effect in both the singular and plural forms. In the text, I attempt to use forms of these words which indicate that judges may identify more than one purpose and effect for an enactment.

[74] *Ibid.* at 351-52.

Justice Wilson, speaking for herself in separate reasons devoted largely to this issue, adopted a different position. She rejected the importance of purpose at this stage of the analysis, and reasoned that the sole question is whether the legislation "has the effect of violating an entrenched right or freedom."[75] She reasoned that "so long as a statute has such an actual or potential effect on an entrenched right, it does not matter what the purpose behind the enactment was."[76]

In *Big M*, the Chief Justice did not discuss in detail the sort of investigation judges must undertake to identify the purposes and effects of a legislative provision, or to determine whether a purpose or an effect is to limit a right or freedom. He did point out that "[P]urpose and effect ... are clearly linked," and that "intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity."[77] Further, he held that the relevant purpose is the purpose intended by the enacting legislature at the time of the enactment. He rejected the argument that Canadian judges should follow the view of some judges in the United States that the purposes of legislation may "shift, or be transformed over time by changing social conditions."[78] It is true that if judges consider not the enacting legislature's purposes for

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[75] *Ibid.* at 372.

[76] *Ibid.* at 373. On a technical analysis there may not be much difference in the application of the two tests. This may be seen if one assumes that a single judge applies both tests. If the judge holds under the Chief Justice's test that a purpose of the enactment is not to limit a right or freedom, the judge must consider the effects of the provision just as he or she must do when applying Justice Wilson's test. Therefore, in this case the two tests yield the same result. If the judge holds under the Chief Justice's test that a purpose of the provision is to limit a right or freedom, he or she may nevertheless hold under Justice Wilson's test that the provision does not affect a right or freedom. In this case the two tests yield different results. These holdings are unlikely, however, as one of the effects of a provision is to achieve its purposes if the provision is reasonably well drafted. As the Chief Justice observed in *Big M* at 351, it is "difficult to conceive of legislation with an unconstitutional purpose, where the effects would not also be unconstitutional." Nevertheless, in *Robertson and Rosetanni* v. *The Queen* (1963), [1963] S.C.R. 651 at 656-58, 41 D.L.R. (2d) 485 at 493-94 [hereinafter *Robertson and Rosetanni* cited to D.L.R.], Ritchie J. held that s. 4 of the Lord's Day Act was enacted for a religious purpose but did not affect freedom of religion. However, Justice Ritchie's holding as to purpose was in the context of the division of legislative authority under ss 91 and 92 of the Constitution Act, 1867 (U.K.), 30 and 31 Vict., c. 3. See also Anisman, *supra*, note 62 at 29-30.

[77] *Big M*, *ibid.* at 350.

[78] *Ibid.* at 352-53. See also 348.

enacting the provision, but the current legislature's purposes for not repealing it, there is uncertainty in the sense that a law held at one time to be valid may be held at a later time to be invalid on the basis of "a revised judicial assessment of purpose."[79] On the other hand, judges who reject the validity of a provision on the basis of the enacting legislature's purposes, may, if the legislature immediately re-enacts the provision, be required to reconsider the matter on the basis of the current legislature's purposes. Professor Hans A. Linde commented that "In practice, court and counsel want to debate whether the law is constitutional now, not when it was enacted."[80]

At this stage of *Charter* analysis, judges are not required to characterize the purposes and effects of the challenged enactment fully, but only to the extent necessary to determine whether a purpose or an effect of the enactment is to limit a right or freedom. For example, judges may hold that one purpose of the provision is to limit a right or freedom without determining what other purposes the provision has, or what effects it has on the right or freedom. If they determine that the provision does limit a right or freedom, they proceed to section 1; in the section 1 analysis they undertake a more complete examination in which they identify and assess all the purposes of the enactment and all the effects of the enactment on the right or freedom.[81] Although the judges' consideration of purposes and effects is limited at this stage of the analysis, it is indeterminate.

When I discuss the section 1 analysis,[82] I argue that as the process of identifying purpose is complex and indeterminate, judges

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[79] *Ibid.* at 352.

[80] H.A. Linde, "Due Process of Lawmaking" (1976) 55 Nebraska L.R. 197 at 217. Professor Linde suggested at 222 that the underlying question is whether courts should "review the one-time reasonableness of lawmakers or the continuing reasonableness of laws."

[81] In the s. 1 analysis, judges must identify the purposes of the provision so that they may determine whether the purposes are consistent with the principles of a free and democratic society and "sufficiently important" to warrant a limit; they must identify the effects of the provision on the right or freedom so that they may determine whether the means used are the least restrictive means, and so that they may balance the severity of the effects against the importance of the purposes. See, generally, the discussion of the s. 1 analysis, *infra*.

[82] *Infra*, text at notes 163-69.

have considerable leeway in their decision making. Judges may look to a number of different sources to determine purpose, and these sources may suggest not a single purpose but a number of possible purposes. Judges may select one or more of these purposes, state those selected in broad or narrow terms, characterize some as "important" or "primary," and reject others as "unimportant." In *Big M*, for example, the Chief Justice identified two purposes for section 4 of the Lord's Day Act:[83] "securing public observance" of the Christian Sabbath, and "providing a uniform day of rest from labour,"[84] and he characterized the first purpose as primary.[85] The decision suggests that if the primary purpose of an enactment is to limit a right or freedom, the enactment limits even if there is a secondary purpose. It leaves open the question whether the enactment limits a right or freedom if the primary purpose is to do something other than limit and the secondary purpose is to limit. The secondary purpose may be to impose a limit in the sense that the legislature was prepared to limit a right or freedom in order to achieve its primary purpose.[86]

As the process of identifying purpose is indeterminate, it does not point to a single answer to the question whether a purpose of a legislative provision is to limit a right or freedom. Since judges are free to select one purpose rather than another, they are free to conclude that the provision does or does not impose a limit. In the absence of clear rules to determine whether a purpose of an enactment is to impose a limit, judges may engage in result-oriented decision making; they may manipulate the analysis in order to justify the result they wish to achieve on the basis of their policy preferences and their perceptions of the appropriate judicial role in

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[83] *Supra*, note 17.

[84] *Supra*, note 1 at 338.

[85] *Ibid.* at 353 and 366.

[86] In *Big M* the secondary purpose was *ultra vires* the federal Parliament. The Chief Justice did not determine whether government may rely on an *ultra vires* purpose at the first stage of the *Charter* analysis. However, he held at 366-67 (and Wilson J. agreed at 373) that government may not rely on an *ultra vires* purpose in the s. 1 analysis. There is little reason to allow government to rely on an *ultra vires* purpose at the first stage of the analysis if it may not rely on the purpose in the s. 1 analysis. See, *infra*, text at notes 117-19.

constitutional adjudication. Some may hold that a purpose of the enactment is to limit a right or freedom; these judges go on to the section 1 analysis. Others may hold that it is not a purpose of the enactment to impose a limit; these judges go on to consider whether an effect of the enactment is to impose a limit.

The process of identifying the effects of a legislative provision is also complex and indeterminate. As indicated above, at this stage of the analysis judges need not undertake a full consideration of the effects of the provision. They need only determine whether the provision has an effect on a right or freedom, that is, whether it "interferes by its impact with"[87] a right or freedom. However, even the limited inquiry which must be undertaken to reach this determination is not a simple one.

First, judges may agree on the impact a legislative provision has, and disagree on the question whether the provision affects a right or freedom. In *Robertson* v. *Rosetanni*,[88] judges who agreed that the impact of section 4 of the *Lord's Day Act* is to prohibit all persons, regardless of religious affiliation if any, from carrying on business on Sunday, nevertheless disagreed on the question whether the section has an effect on freedom of religion. Ritchie J. held that the section does not affect freedom of religion, but has only a secular and financial effect.[89] Cartwright J., dissenting, held that the section does affect freedom of religion.[90]

Second, a legislative provision may have a number of effects. Judges may characterize one of these effects as "an important" effect, the "primary" effect or the "sole" effect. A judge who stresses the importance of an effect that is not related to a right or freedom is less likely to hold that a provision limits a right or freedom than a judge who stresses the importance of an effect that is related to a right or freedom.

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[87] *Supra*, note 1 at 352.

[88] *Supra*, note 76.

[89] *Ibid.* at 494.

[90] *Ibid.* at 488-89.

Third, as the jurisprudence develops, the justices of the Supreme Court will have to decide whether the rule should be that a provision imposes a limit if it has the slightest effect on a right or freedom or only if it has a substantial effect on a right or freedom. A slightest effect test may appear to give more protection to the rights and freedoms, but may lead to holdings that appear trivial or fanciful. For example, on the slightest effect test, a justice may hold that income tax, labour relations, and town planning legislation limit freedom of the press.[91] Further, a slightest effect test is wasteful because it puts litigants to the expense of preparing a section 1 analysis in cases where judges are almost certain to hold that the limit is justified under section 1. Judges are more likely to hold that a limit comes within section 1 if they characterize it as having only a slight effect on a right or freedom, than if they characterize it as having a substantial effect.[92]

To avoid these difficulties the justices of the Supreme Court may refine the effects test to provide that a provision limits a right or freedom only if it has a substantial effect on the right or freedom. If the doctrine develops in this way, the determination whether an effect is substantial or not will be another point in the analysis at which judges may disagree. In the absence of clear rules to determine what is a substantial effect, judges may engage in result-oriented decision making by manipulating the doctrine to justify choices determined not by the doctrine but by their policy preferences and their views about the desirability of judicial activism or restraint.

It will be difficult if not impossible to develop determinate rules to determine whether an effect is substantial. The doctrine might distinguish between direct and indirect effects, and provide that an effect is substantial only if it is direct. This is not satisfactory because direct effects may be trivial, and indirect effects severe. Further, judges may not agree whether an effect is direct or indirect. Indeed, judges may not agree whether an enactment affects a right or freedom indirectly or not at all. In *Robertson and*

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[91]This sort of legislation may have an effect on the financial position of newspaper publishers.

[92]See *infra*, text at notes 191-204.

Rosetanni, Ritchie J. expressed the view that the *Lord's Day Act* affects only secular and financial interests by saying that the Act does not affect freedom of religion at all.[93] In *Braunfeld* v. *Brown*, Chief Justice Earl Warren of the United States Supreme Court expressed a similar view by saying that the Sunday law he was considering "imposes only an indirect burden on the exercise of religion," that is, affects freedom of religion indirectly.[94] If the doctrine requires judges to make these distinctions, the result is likely to be an increase, not a decrease, in the opportunity for result-oriented decision making.

I shall note briefly two other features of a substantial effect test. First, it is arguable that a substantial effect test will give the justices of the Supreme Court more control over decision making by lower court judges than a slightest effect test. This argument rests on the view that when the justices of the Supreme Court apply a substantial effect test and hold that an enactment which has a slight effect on a right or freedom does not impose a limit, they state a rule of law about the enactment that is "binding" on lower court judges. On the other hand, when they apply a slightest effect test and hold that an enactment which has a slight effect on a right or freedom imposes a limit, but that the limit is within section 1 because the slight effect is outweighed by the importance of the legislative purposes, their decision is *ad hoc* and has little value as a precedent. This argument is similar to one I discuss with respect to definitional balancing,[95] and is not persuasive for the reasons I give when I discuss definitional balancing.

Second, when judges consider whether the effect of an enactment is substantial, they are dealing with a factor that is also an element of the section 1 analysis. In that analysis, judges must balance the "severity" of the effects of a limit of a right or freedom against the importance of the purposes the legislature seeks to

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[93] *Supra*, text at note 89.

[94] (1961), 366 U.S. 599 at 606.

[95] *Supra*, text at notes 64-67.

achieve by imposing the limit.[96] As "substantiality" and "severity" are the same in this context, the process of determining whether an enactment limits a right or freedom encompasses an element of the balancing of values that takes place under section 1. Therefore, this process, like the process of definitional balancing, is a point at which the two stages of *Charter* analysis overlap.[97] Indeed, quite apart from the element of balancing in the substantial effect test, the two stages of analysis overlap in the sense that judges must consider the purposes and effects of an impugned enactment to determine both whether the enactment imposes a limit and whether the limit comes within section 1.

An example will, perhaps, illustrate the wide range of options open to judges when they consider the purposes and effects of a legislative provision in order to determine whether the provision limits a right or freedom.

A municipal by-law prohibits the sale of goods on the street. By way of example, the by-law lists a number of street vending operations that are prohibited, including the sale of newspapers from vending boxes.

(a) Justice A holds that the municipal council's primary purpose in the part of the by-law referring to newspaper vending boxes was to limit freedom of the press. Justice B holds that the council's primary purpose was not to limit freedom of the press, but its secondary purpose was to do so in the sense that it was prepared to limit the freedom in order to attain its other purposes. Both A and B hold on the basis of the purpose test alone that the by-law imposes a limit. Both proceed to the section 1 analysis.

(b) Justice C agrees with B that the municipal council's secondary purpose was to limit freedom of the press. C holds that as this is not an important purpose of the by-law, the by-law does not impose a limit by reason of its purposes. C goes on to consider the effects of the enactment.

(c) Justices D, E, F, and G hold that the municipal council's purposes were to ensure the free flow of traffic on the streets, to protect the livelihood of store owners, and to maintain the aesthetic

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[96] See *infra*, text at notes 191-204.

[97] See *supra*, text at note 71 and, *infra*, text at note 195.

qualities of the streets. These judges reject the argument that one of the council's purposes was to limit freedom of the press. They go on to consider the effects of the enactment.

(d) Justice C holds that the by-law has a direct, and therefore a substantial, effect on freedom of the press because it prohibits a means of distributing newspapers. Justice D holds that the effect on freedom of the press, although indirect because it does not prohibit the publication of any statement, is substantial because distribution through street vending boxes is less costly than other means of distribution (which may require subscription lists and home delivery), and therefore may be critical to the survival of some newspapers. Justice E accepts D's view that the effect on freedom of the press is indirect, but not D's view that the effect is substantial; E holds that the effect is slight both because it is indirect and because publishers may use other means to distribute newspapers. However, E applies the slightest effect test and concludes that the enactment limits the freedom. Thus, although each of these three judges applies the effect test differently, each holds that the provision limits freedom of the press, and proceeds to the section 1 analysis.[98]

(e) Justice F agrees with E that the effect on freedom of the press is both indirect and slight. However, F applies the substantial effect test and concludes that the by-law does not limit the freedom. Justice G holds that the enactment has no effect on the freedom, because it does not prohibit the press from publishing any statement. Although F and G disagree about the effect the enactment has on the freedom, they agree that the enactment does not limit the freedom. Accordingly, they dismiss the claim for a remedy under the *Charter* without a section 1 analysis.

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[98]Since E holds that the effect on freedom of the press is slight, E is perhaps more likely than C or D to hold in the s. 1 analysis that the limit comes within s. 1 on the ground that the importance of the legislative purposes outweighs the severity of the effect of the limit on the freedom. See *infra*, text at notes 191-204.

2. Exceptional limits that may not come within section 1

The justices of the Supreme Court suggested in *A.G. Quebec* v. *Quebec Association of Protestant School Boards* that some limits are of a sort that may not come within section 1, and that judges may invalidate these limits without reference to section 1.[99] This is a departure from the usual rule that an enactment that limits a right or freedom is valid if the limit meets the requirements of section 1. Professor Peter Hogg, in his treatise, following the language used by Deschênes C.J., the trial judge in the *School Boards* decision, referred to these exceptional limits as "denials" of a right or freedom.[100]

The reasons given in the *School Boards* decision do not clearly indicate how judges are to distinguish between a legislative provision that imposes a limit that may come within section 1, and a provision that imposes a limit that may not come within section 1. The notion of the limit that may not come within section 1 is, therefore, an indeterminate element in *Charter* analysis. Judges have freedom to disagree on the characterization of a limit as one that may or may not come within section 1 and, therefore, freedom to manipulate this distinction in order to achieve goals suggested by policy preferences and perceptions of the appropriate judicial role in constitutional adjudication under the *Charter*.

In the *School Boards* decision, the justices of the Supreme Court held that provisions of the Quebec *Charter of the French Language*, known as Bill 101,[101] setting out the conditions under which a child may be educated in English in Quebec, are inconsistent with section 23 of the *Charter* which sets out broader conditions under which a child may receive an education in either English or French anywhere in Canada. The justices gave two reasons to support the decision to invalidate the limit contained in the Quebec enactment without considering section 1. These reasons

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[99](1984), [1984] 2 S.C.R. 66 at 84 and 88, 10 D.L.R. (4th) 321 at 336 and 338 [hereinafter *School Boards* cited to D.L.R.].

[100]P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 682-84.

[101]R.S.Q. 1977, c. C-11, chap. VIII, ss 72 and 73.

suggest possible rules for identifying a limit that may not come within section 1. The first reason turns on the purposes of section 23 of the *Charter* and of the Quebec enactment; the second turns on the effect of the Quebec enactment. A consideration of the two reasons suggests that in view of the more sophisticated doctrine developed in *Big M* and *Oakes* there is little reason for the Court to retain the concept of the limit that may not come within section 1.

First, the justices held that the framers of the *Charter* included section 23 specifically for the purpose of invalidating the provisions of Bill 101 (which were in force at the time the *Charter* was adopted).[102] Therefore, the justices reasoned, the framers of the *Charter* cannot have regarded the provisions of Bill 101 as coming within section 1.[103] This reasoning suggests the following rule: a limit of a right or freedom is a limit of the sort that may not come within section 1 if the framers of the *Charter* intended the guarantee of the right or freedom to invalidate the enactment containing the limit.

This rule appears to be one that encourages judicial activism as it enables judges to invalidate a limit without undertaking a section 1 analysis. However, as judges may readily disagree about the intentions of the framers,[104] it is a rule that judges may circumvent if they wish to do so. Although judges who engage in judicial activism may invoke the rule, judges who wish to defer to legislatures may avoid the rule by holding that the section containing the right or freedom limited by an impugned enactment was not included in the *Charter* specifically for the purpose of invalidating the enactment. For example, some but not all judges may hold that the framers of the *Charter* adopted the wording of section 15(1) specifically for the purpose of invalidating the sections of the Indian

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[102] *Supra*, note 99 at 331-35.

[103] *Ibid.* at 335-36. However, it is arguable that if the framers intended to exclude the operation of s. 1, they would have said so explicitly. *Cf.* s. 28 of the *Charter*.

[104] In the *B.C. Motor Vehicle Reference*, *supra*, note 9 at 508-09, Lamer J. stated that "the intention of the legislative bodies which adopted the *Charter*" is "a fact which is nearly impossible of proof." See also, *supra*, text at notes 37-38.

In *School Boards*, *ibid.* at 331-35, the justices based their holding that the framers intended s. 23 to invalidate Bill 101 on a consideration of the history of language of instruction legislation in Quebec, and a comparison of the terms of the two enactments.

Act and the Unemployment Insurance Act which were held to be valid in decisions[105] applying the Canadian Bill of Rights.

The justices' second reason for holding that Bill 101 imposes on the section 23 right a limit that is invalid without reference to section 1, focused on the effects of Bill 101. The justices held that "the real effect" of Bill 101 "is to make an exception to" section 23 of the sort contemplated by section 33 of the *Charter*; that Bill 101 "directly alters the effect of section 23 ... without following the procedure laid down for amending the Constitution"; that there is "direct conflict" between Bill 101 and section 23, and that the two "collide directly."[106] The justices summarized their reasons in their conclusion on this point:

> The provisions of s. 73 of Bill 101 collide directly with those of s. 23 of the *Charter*, and are not limits which can be legitimized by s. 1 of the *Charter*. Such limits cannot be exceptions to the rights and freedoms guaranteed by the *Charter* nor amount to amendments of the *Charter*. An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the *Charter*, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1. The same applies to chap. VIII of Bill 101 in respect of s. 23 of the *Charter*.[107]

This reasoning suggests the following rule: a limit on a right or freedom will be ruled invalid without reference to section 1 if its effects are in direct conflict with the right or freedom so that it amounts to an exception of the sort that may be made under section 33 or by amendment of the *Charter*.

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[105] *A.G. Canada* v. *Lavell* (1973), [1974] S.C.R. 1349, 38 D.L.R. (3d) 481; *Bliss* v. *A.G. Canada* (1978), [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417. See W.S. Tarnopolsky, "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar Rev. 242 at 248-50.

Although s. 24(2) of the *Charter* does not guarantee a right or freedom, judges may hold that it was included in the *Charter* specifically to overturn the common law rule that all relevant evidence, however obtained, is admissible in criminal proceedings.

Judges may apply the rule being discussed not only to enactments existing in 1982 which they hold the framers wished to invalidate, but also to future enactments similar in content to those enactments.

[106] *Supra*, note 99 at 337-38.

[107] *Ibid.* at 338. The justices did not hold that a limit of the sort that may not come within s. 1 must take away the whole of a right or freedom. Bill 101 itself did not take away the whole of the s. 23 right to educate children in English in Quebec. See also the justices' treatment at 327, 331 and 336 of the decision of Beauregard J. of the Quebec Court of Appeal.

The justices' holding appears to be that a limit that may not come within section 1 is unlike a limit that may come within section 1 (and like an amendment, or an exception enacted pursuant to section 33) because its effect is in direct conflict with a *Charter* right or freedom. When this issue arises in the future justices may hold that this reasoning has been overtaken by the reasoning developed in *Big M* and *Oakes*. The decision in *Big M* indicates that an enactment that has an effect on a right or freedom is a limit. This includes an enactment that has a direct effect on (or "collides directly" with) a right or freedom. An enactment that has a direct effect on a right or freedom is likely to be more severe than one that has an indirect effect. However, the directness of the effect and the consequent severity of the limit is not a reason to hold that the limit is of a sort that may not come within section 1.[108] The decision in *Oakes* indicates[109] that the severity of the effect is a factor to be balanced against the importance of the legislative purposes to determine if the limit comes within section 1.[110]

In *Big M*, both Dickson C.J.[111] and Wilson J.[112] referred to the *School Boards* decision. However, neither justice suggested that section 4 of the *Lord's Day Act* imposes a limit on freedom of conscience and religion that may be invalidated without considering section 1. Both justices held that section 4 of the *Lord's Day Act* limits freedom of conscience and religion,[113] and that the limit does not come within section 1 of the *Charter*.[114] The Chief Justice identified two legislative purposes for the enactment: securing

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[108] *Supra*, text at notes 72-80 and 87-97. Legislation prohibiting obscenity has a direct effect on freedom of expression in the sense that it directly prohibits the publication of certain statements. Such legislation may, nevertheless, be upheld under s. 1.

[109] *Infra*, text at notes 191-204.

[110] *Cf.* Hogg, *supra*, note 100 at 684.

[111] *Supra*, note 1 at 351.

[112] *Ibid.* at 372 and 374.

[113] *Ibid.* at 365 and 369.

[114] *Ibid.* at 367 and 369.

observance of the Christian Sabbath, and providing a uniform day of rest from labour;[115] and he held that the religious purpose is the primary purpose.[116] Both justices held[117] that the government could not rely on the secular purpose because the Supreme Court had never in the past found it to be the purpose of the legislation, and because it is an ultra vires purpose in the context of the constitutional division of legislative authority. Therefore, in the section 1 analysis, the government could rely only on the religious purpose, that is, on its intention to abridge freedom of religion. As a result the government failed in the section 1 analysis. To succeed in the section 1 analysis, government must show that one of its purposes is a purpose that judges may balance against the right or freedom and find consistent with the principles of a free and democratic society and "sufficiently important" to warrant the limit.[118] Government will not succeed if, as in *Big M*, the only purpose on which it may rely is the purpose of limiting the right or freedom, as this is not a purpose that judges may balance against the right or freedom and find consistent with these principles and "sufficiently important." Wilson J. put the point in these words:

> Given that the federal government cannot rely on an *ultra vires* purpose in attempting to uphold the legislation under s. 1 any attempt to characterize the *Lord's Day Act* as a reasonable limit on the *Charter* right to freedom of religion must fail. To hold otherwise would be to find that the s. 2(a) right to religious freedom can be legitimately curtailed where Parliament acts for the purpose of curtailing religious freedom. Without having to determine at this point the principles upon which an evaluation of a given government objective and its reasonableness as a limit on a *Charter* right will be premised, it is possible to state with certainty that this governmental objective or interest cannot pass the s. 1 test. Indeed, it was made clear in *Quebec Protestant School Boards, supra*, that legislation cannot be regarded as embodying legitimate limits within the meaning of s. 1 where the legislative purpose is precisely the purpose at which the *Charter* right is aimed.[119]

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[115] *Ibid.* at 338.

[116] *Ibid.* at 353.

[117] *Ibid.* at 366-67 and 373.

[118] See *infra*, text at notes 159-81.

[119] *Supra*, note 1 at 373-74. This passage from Justice Wilson's reasons suggests an explanation for the decision in the *School Boards* case that does not depend on the idea of the (continued...)

III. THE SECOND STAGE OF *CHARTER* ANALYSIS: DETERMINING WHETHER A LIMIT COMES WITHIN SECTION 1

Section 1

> The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

A. *The Section 1 Standard of Justification*

When judges come to the section 1 analysis, they have already determined that the legislative provision under review imposes a limit on a *Charter* right or freedom. (If they hold that there is no limit, the legislative provision is not inconsistent with the *Charter* and the section 1 inquiry is not necessary.) The judges' task in the section 1 analysis is to determine whether the limit meets the three requirements of section 1 that it be (i) a reasonable limit, (ii) that is prescribed by law, and (iii) that can be demonstrably justified in a free and democratic society. If the judges hold that the limit meets these requirements, the legislative provision is allowed to stand although it limits a right or freedom. If they determine that the limit does not meet any one of the three requirements, they declare that the legislative provision is "of no force or effect."[120]

When judges consider whether a legislative limit on a right or freedom is salvaged under section 1, they must determine whether the right or freedom should give way to enable the legislature to attain the purposes for which it passed the legislation,

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[119](...continued)
exceptional limit that may not come within s. 1. If the holding that s. 23 was adopted to invalidate Bill 101 implies that the purpose of Bill 101 was to infringe s. 23, and if this was the sole purpose on which the Quebec government relied, then on the basis of the passage quoted the result of a s. 1 analysis is that the limit is not justified.

[120]See the *Charter*, *supra*, note 3, s. 52.

or the legislation should be invalidated to preserve the right or freedom. In making this determination, judges balance the social interests or values underlying the right or freedom against the social interests or values which the legislature sought to promote by enacting the legislation. The judges' task in the section 1 analysis, therefore, is to balance the *Charter* values against the legislative values, and to determine which should in the circumstances prevail.

In *Oakes*, which contains the Supreme Court's most complete treatment of the meaning and application of section 1, Dickson C.J. recognized that the judicial task in the section 1 analysis is to balance competing values. He said

> The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.
>
> The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*....[121]

Again, when discussing the proportionality test, he said, "... in each case courts will be required to balance the interests of society with those of individuals and groups."[122]

In his discussion of the words "free and democratic society," the Chief Justice again stressed the importance of an assessment of values in the section 1 analysis. Further, he used these words to develop a standard of justification against which to assess a limiting enactment. These words, he said, refer "the court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic."[123] The "values and principles essential to a free and democratic society" constitute "the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified." These values and principles include respect for human dignity, social justice, equality, diversity of beliefs,

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[121] *Supra*, note 2 at 225.

[122] *Ibid.* at 227.

[123] *Ibid.* at 225.

cultural and group identity, and the institutions of participatory democracy.[124] Thus, the Chief Justice used the words "free and democratic society" to develop a standard made up of a set of values and principles against which the values furthered by a limiting enactment are to be measured and balanced.

The Chief Justice's approach to the words "free and democratic society" is different from the approach taken by some lower court judges before the Supreme Court decision in *Oakes*. Many lower court judges treated these words not as a source of a standard of justification which gives values a central place in the section 1 analysis, but as a direction to use comparative jurisprudence as a component of the analysis. These judges canvassed legislation and case law in other jurisdictions to ascertain whether other free and democratic societies impose limits on the rights and freedoms that are similar to the limit imposed by the impugned enactment. The lower court judges looked most frequently to the laws of Britain, other Commonwealth countries, and the United States.[125]

A consideration of the standard of justification developed by the Chief Justice indicates that judges have a great deal of freedom when they apply the standard to assess a limiting enactment. The standard is made up of the values and principles essential to a free and democratic society. As these values and principles are stated in general terms, judges must define them before they may apply the

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[124] *Ibid.* at 225. Compare the values and principles listed here with the characteristics of a free society identified by the Chief Justice in *Big M*, *supra*, note 1 at 353.

[125] See for example, *Re Southam and R. (No. 1)* (1983), 41 O.R. (2d) 113 at 129-34, 146 D.L.R. (3d) 408 at 424-29 (C.A.) [hereinafter *Southam* cited to D.L.R.]. MacKinnon A.C.J.O. expressed reservations about the help that Canadian judges may derive from a consideration of the law of other jurisdictions. He said at 424-25:

> In determining whether the limit is justifiable, some help may be derived from considering the legislative approaches taken in similar fields by other acknowledged free and democratic societies. Presumably this may also assist in determining whether the limit is a reasonable one. It may be that some of the rights guaranteed by the *Charter* do not have their counterpart in other free and democratic societies and one is sent back immediately to the facts of our own society. In any event I believe the court must come back, ultimately, having derived whatever assistance can be secured from the experience of other free and democratic societies, to the facts of our own free and democratic society to answer the question whether the limit imposed on the particular guaranteed freedom has been demonstrably justified as a reasonable one, having balanced the perceived purpose and objectives of the limiting legislation, in light of all relevant considerations, against the freedom or right allegedly infringed.

standard. In so doing they define the standard itself. Judges who disagree with one another about the meaning of the values and principles may disagree about the content of the standard. Further, as the standard is made up of a number of values and principles, the judges applying the standard decide which values and principles to emphasize in a particular case, and so again they may disagree about the content of the standard. As the judges applying the standard themselves create it, they may in a particular case fashion a standard that supports either a decision that a limit conforms to the standard or a decision that it does not conform to the standard.[126] Therefore, judges may invoke the standard of justification to justify decisions that are based on their policy preferences and their views about the desirability of judicial activism or restraint in constitutional adjudication. This is another point in *Charter* analysis at which doctrine does not control decision making.

The language used by the Chief Justice in *Oakes* suggests that in the section 1 analysis judges should not show deference to the will of legislative majorities, but rather should adopt an activist stance in order to protect the values underlying the rights and freedoms. Indications of activism appear in the Chief Justice's holding that a limit on a right or freedom must meet a "stringent standard of justification,"[127] in his holding that the government bears a heavy onus of proof, and in the doctrine he developed for the analysis of the purposes, means, and effects of an enactment containing a limit.

The Chief Justice sought to justify the adoption of doctrine suggestive of judicial activism by reference to the language of section 1. First, he noted that section 1 "constitutionally guarantees the rights and freedoms" set out in the *Charter*. Judges undertake the section 1 analysis only after they hold that an enactment violates "rights and freedoms which are part of the supreme law of Canada." Second, the words "free and democratic society" indicate that the purpose of the *Charter* is to ensure that "Canadian Society is to be

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[126] I take essentially the same view of the use of the values and principles of a free and democratic society as an aid to the definition of the rights and freedoms. See *supra*, text at note 29. For discussion of the application of the standard of justification in the s. 1 analysis see *infra*, text at notes 178-81; 184 and 190, and 202-203.

[127] *Oakes*, *supra*, note 2 at 225.

principles of a free and democratic society are the ultimate standard against which a limit" must be justified. On the basis of these two factors, he concluded that the criteria in section 1 impose "a stringent standard of justification." Further, because limits on the rights and freedoms are "exceptions to their general guarantee," there is no presumption of constitutionality in favour of legislation containing a limit. Indeed, "(t)he presumption is that the rights and freedoms are guaranteed...." This presumption and the words "demonstrably justified" establish that a limit may not be brought within section 1 easily.[128]

Although the Chief Justice used language that appears to mandate judicial activism in the section 1 analysis, I shall argue that the doctrine he developed to govern the section 1 analysis, like the doctrine developed to govern the first stage of *Charter* analysis, may be used by judges to justify either activism or restraint.

B. *The Onus of Proof under Section 1*

The Chief Justice, in *Oakes*,[129] held that the party seeking to uphold a limit on a right or freedom has the onus of bringing the limit within section 1. It is not the criminal onus of proof beyond a reasonable doubt as that would be "unduly onerous on the party seeking to limit."[130] It is the civil onus of proof on a preponderance of probability, but it is at the high end of the civil onus which requires "a very high degree of probability."[131] It is not an onus of proof of fact, but an "onus of justification,"[132] an onus of establishing "the constituent elements of a s.1 inquiry,"[133] that is, that the limit is a reasonable one that is prescribed by law and

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[128] *Ibid.* at 224-26.

[129] *Ibid.* at 225-27.

[130] *Ibid.* at 226.

[131] *Ibid.*

[132] *Ibid.*

[133] *Ibid.*

demonstrably justified in a free and democratic society. The evidence necessary to discharge the onus must be "cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit."[134]

Chief Justice Dickson's discussion of the onus of proof follows his general discussion of section 1 in which he concluded that the section imposes a stringent standard of justification for limits. The imposition of a heavy onus on the party seeking to justify a limit is one of the factors that causes the standard of justification to be stringent. The Chief Justice gave two reasons to support his conclusions about the onus. First, section 1 guarantees the rights and freedoms, and limits are exceptions to this general guarantee. Therefore, he said, "(t)he presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited."[135]

The Chief Justice's holding that the "presumption is that the rights and freedoms are guaranteed" appears to mean that after a judge holds that an enactment limits a right or freedom and enters upon the section 1 analysis, there is a presumption that the limit does not come within section 1; that is, there is a presumption that the limit is unconstitutional. The onus on the party seeking to limit is a heavy onus because that party must overcome the presumption of unconstitutionality in order to persuade a judge that the limit comes within section 1. The Chief Justice did not consider in *Oakes* or *Big M* whether there is a presumption of constitutionality

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[134] *Ibid.* at 227. Before the Supreme Court decision in *Oakes*, some lower court judges held that the party seeking to limit bears the onus in the s. 1 analysis. See, for example, *Southam*, *supra*, note 125 at 419-20. MacKinnon A.C.J.O. said, at 419, that the party seeking to uphold the limit must establish that the limit comes within s. 1 "by evidence, by the terms and purpose of the limiting law, its economic, social and political background, and, if felt helpful, by references to comparable legislation of other acknowledged free and democratic societies." See also *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 41 O.R. (2d) 583 at 589-90, 147 D.L.R. (3d) 58 at 64-65 (Div. Ct), aff'd (1984), 45 O.R. (2d) 80, 5 D.L.R. (4th) 766 (C.A.) [hereinafter *Ontario Film and Video* cited to D.L.R.].

[135] *Oakes*, *ibid.* at 226.

in the first stage of *Charter* analysis, or which party bears the onus in that stage.[136]

The second reason the Chief Justice gave to support his conclusions about the onus of proof turns on the presence in section 1 of the words "demonstrably justified." These words, he said, indicate not only that the onus is on the party seeking to limit[137] but also that the onus is a heavy one.[138]

What is the significance of the Chief Justice's holding that the party seeking to justify a limit under section 1 has a heavy onus? This holding tends toward judicial activism and the protection of the *Charter* rights and freedoms. It is arguable that the justices of the Supreme Court intended by their ruling on onus to signal a high degree of activism on their own part and to encourage a high degree of activism on the part of lower court judges. If the justices had wished to indicate that in the balancing of values that takes place under section 1 they intended to exercise restraint and to show deference to legislatures, they might have imposed on the party relying on the *Charter* the onus of proving that a limit does not come within section 1.[139]

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[136]In *Ontario Film and Video, supra*, note 134 at 64, the justices of the Ontario Divisional Court suggested that there is a presumption of constitutionality at the first stage of *Charter* analysis, but not at the second stage (the s. 1 analysis), because that stage is not reached until after the judge holds that the enactment limits a right or freedom. In *Southam, supra*, note 125 at 420, MacKinnon A.C.J.O. suggested that there is no presumption of constitutionality at either stage of *Charter* analysis, at least where the impugned legislative provision was enacted before the *Charter*. See also Hogg, *supra*, note 100 at 681-82.

I suggest in the text that the statement in *Oakes* means not that there is no presumption of constitutionality in the s. 1 analysis, but that there is a presumption of unconstitutionality. In theory at least, the party seeking to limit has a heavier burden if it must overcome a presumption of unconstitutionality than it has if there is no presumption either way.

[137]*Oakes* at 226. "This is further substantiated by the use of the word 'demonstrably' which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter* v. *Southam Inc., supra*." In *Hunter, supra*, note 7 at 660, Dickson C.J., speaking for the Court, said "The phrase 'demonstrably justified' puts the onus of justifying a limitation on a right or freedom set out in the *Charter* on the party seeking to limit."

[138]*Oakes* at 226. "Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase 'demonstrably justified' in s. 1 of the *Charter* supports this conclusion."

[139]In *Southam, supra*, note 125 at 420, counsel for the Crown argued that because there is a presumption of constitutionality the party alleging an abridgement of the *Charter* has the onus of proof under s. 1.

The Chief Justice's ruling on the onus of proof means, at least in formal terms, that the party seeking to limit a right or freedom has a more difficult position in the section 1 analysis than it would otherwise have. Often, but not always, the party seeking to limit is a government or an agency of government. The ruling on onus requires the government to establish, by evidence and argument, each of the three elements required to bring the limit within section 1. If the government does not lead evidence or advance argument respecting any one of the elements, it has not discharged its onus and the judge may hold that the limit is not within section 1. If the government does lead evidence or advance argument respecting a section 1 element, the judge may nevertheless hold that the government has not established the element to "a very high degree of probability"[140] and, therefore, has not discharged its onus.

Clearly, then, in formal terms, the decision to place a heavy onus on the government in the section 1 analysis makes it harder for government to succeed at this stage of the analysis, and easier for judges to hold that a limit is not salvaged under section 1. In this sense, the ruling on onus tends to promote activism, not deference to legislatures.

However, the rule governing onus does not require justices of the Supreme Court or lower courts to be activist in the section 1 analysis. In the application of the rule, the justices hearing each particular case have a discretion to determine whether the government has or has not discharged the onus it bears. For this reason, the ruling on onus is not determinative of decision making in individual cases. A justice inclined to exercise judicial restraint in general or in a particular case will be more likely than a justice inclined toward judicial activism to hold that the government has satisfied the onus.

Further, one element in *Oakes* suggests that the justices of the Supreme Court of Canada may not have intended their ruling on onus to signal a high degree of activism. This is the statement of the Chief Justice that although evidence is generally required to prove the constituent elements of section 1, "there may be cases

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[140] *Supra*, text at note 131.

where certain elements of the section 1 analysis are obvious or self-evident."[141]

If judges hold that an element of the section 1 analysis is "obvious or self-evident," the onus on the government with respect to that element is reduced to zero, and the standard of justification with respect to that element is not at all stringent. Given that holding, government is not required to lead evidence or advance argument in order to establish that element. Indeed, if judges hold that a section 1 element is "obvious or self-evident," it may be that the party seeking the protection of the *Charter* is not permitted to refute the existence of that element by evidence or argument. Accordingly, the Chief Justice's statement that in some cases some elements of section 1 may be obvious or self-evident is consistent with judicial restraint and not with judicial activism.

In conclusion, I suggest that the rules governing onus in the section 1 analysis are not determinative of decision making. In the application of the rules, judges have leeway in deciding whether or not government must lead evidence to establish an element of the analysis and, if evidence is required, whether or not government has adduced evidence that is convincing. Accordingly, judges are able to manipulate the rules to justify decisions based on their policy preferences and their views about the desirability of judicial activism or restraint.

C. *"Prescribed by Law"*

The Supreme Court of Canada has not yet considered at length the requirement of section 1 that a limit on a right or freedom be prescribed by law. However, the Ontario Divisional Court and the Federal Court of Appeal considered this requirement in two early decisions. In *Re Ontario Film and Video Appreciation*

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[141] *Oakes* at 227. The *Oakes* case itself is an illustration of this. Although the government introduced evidence of the increasing incidence of drug trafficking and of measures taken by a number of nations to prevent drug trafficking, Dickson C.J. held at 229 that it is, "to a large extent, self-evident" that the government's purpose in passing the impugned legislation (curbing drug trafficking by facilitating the conviction of traffickers through the use of a reverse onus) is a sufficiently important purpose to warrant a limitation of *Charter* rights and freedoms.

Society and Ontario Board of Censors,[142] three justices of the Ontario Divisional Court held that provisions of the *Theatres Act*[143] authorising a Board of Censors to censor, or prohibit the exhibition of, any film impose a limit on freedom of expression that is not prescribed by law. In *Luscher* v. *Deputy Minister, Revenue Canada*,[144] Hugessen J., speaking for the Federal Court of Appeal, held that provisions of the Customs Tariff Act[145] prohibiting the importation of printed or pictorial material that is "immoral or indecent" impose a limit on freedom of expression that is not a reasonable limit prescribed by law. These decisions suggest that to comply with the prescribed by law requirement a limit on a right or freedom must have three features.

First, the judges of the Ontario Divisional Court held that in order to be prescribed by law a limit must have the force of law.[146] A limit must be contained in a statute, regulation or common law rule "to ensure that it has been established democratically through the legislative process or judicially through the operation of precedent over the years."[147] Applying this principle, the judges held that policy statements issued by the Board of Censors setting out the basis on which the Board censored films (for example, sexual explicitness or violence) do not satisfy the prescribed by law requirement, as policy statements that are not contained in legislation or regulations do not have the force of law.[148]

The requirement that limits be established "democratically" or "judicially" appears to be protective of the rights and freedoms;

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[142] *Supra*, note 134.

[143] R.S.O. 1980, c. 498, ss 3, 35 and 38.

[144] (1985), [1985] 1 F.C. 85, 17 D.L.R. (4th) 503 (C.A.) [hereinafter *Luscher* cited to D.L.R.].

[145] R.S.C. 1970, c. C-41, s. 14 and Sch. C, Item 99201-1.

[146] *Ontario Film and Video*, *supra*, note 134 at 67. Dickson C.J. said in *Oakes*, *supra*, note 2 at 224, "[t]he question whether the limit is 'prescribed by law' is not contentious in the present case since s. 8 of the *Narcotic Control Act* is a duly enacted legislative provision."

[147] *Ontario Film and Video*, *ibid.* at 67. See Hogg, *supra*, note 100 at 684.

[148] *Ontario Film and Video*, *ibid.* at 67.

however, it is not a narrow requirement. Limits may be imposed not only by legislation and regulations made by Order-in-Council, but also by regulations made by agencies, such as the Law Society of Upper Canada,[149] granted power by the legislature to make rules. Further, legislative provisions containing limits may be administered not only by courts but also by administrative agencies and officials given authority to do so in properly framed legislation.

The second feature of the prescribed by law requirement is that a limit on a right or freedom must be specific. A limit that is vague, undefined, ambiguous, or uncertain[150] is not a reasonable limit prescribed by law. In *Luscher*, Hugessen J. held that as the words "immoral" and "indecent" are not defined in the *Customs Tariff Act*, and as the meanings of the words are subjective and uncertain, the limit does not come within section 1.[151]

The justices in the two decisions suggested two rather different reasons for the requirement of specificity or certainty. The justices of the Ontario Divisional Court expressed the view that a rule must be certain in order to be a law. "It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression ... must be articulated with some precision or they cannot be considered to be law."[152] Hugessen J. reasoned that law must be certain so that citizens may foresee the consequences of their actions and regulate their conduct accordingly. He said, "[w]hile there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences."[153] Finally, Hugessen J.

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[149] *Klein*, *supra*, note 53.

[150] *Ontario Film and Video*, *supra*, note 134 at 67; *Luscher*, *supra*, note 144 at 506.

[151] At 509-10. Unlike the judges of the Ontario Divisional Court who held that certainty in a limit is required solely by the words "prescribed by law" in s. 1 of the *Charter*, Hugessen J. held that certainty is required as well by the word "reasonable." See *Luscher*, *ibid.* at 506 and 510.

[152] *Ontario Film and Video*, *supra*, note 134 at 67.

[153] *Luscher*, *supra*, at 506. See Hogg, *supra*, note 100 at 684.

noted that lack of certainty in a legislative provision may be cured by judicial construction.[154]

This second feature of the prescribed by law requirement appears to be protective of the rights and freedoms, and conducive to judicial activism. However, as the "rule" requires only that a limit have "some precision" or sufficient certainty to permit prediction of legal consequences, the rule itself is imprecise and uncertain. The judges deciding a particular case have freedom to determine whether this rather vague standard has been met. A justice wishing to exercise restraint and to defer to legislatures may be more easily satisfied that a limit is sufficiently certain than a justice wishing to protect *Charter* rights and freedoms.

Further, with respect to the possibility mentioned in *Luscher* that uncertainty in a legislative provision may be cured by judicial construction, it is not clear whether the judges hearing a *Charter* challenge may themselves administer such a cure. Hugessen J. did not discuss this; he seemed to have in mind that the judges hearing the *Charter* challenge may consider uncertainty in the legislation to have been cured by *earlier* decisions construing the legislation. However, if the judges hearing the challenge may overcome the uncertainty by placing a precise construction on the statute, the requirement is not as protective of the rights and freedoms as it would otherwise be. Judges wishing to defer to the legislature may be inclined to cure the defect and uphold the legislation.

The third feature of the prescribed by law requirement is a special case of the second. If a legislative provision imposing a limit on a right or freedom is to be administered by an official or an administrative agency, the scope of the limit may not be left to the uncontrolled discretion (the "whim") of the official or agency.[155] The legislative provision must set the standard the official or agency is to apply when exercising the discretion. If the legislative provision does not set the standard, the discretion is uncontrolled and the limit is uncertain. This is a special case of the general requirement that a limit be certain.

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[154] *Luscher*, *ibid.* at 507 and 508-10.

[155] *Ontario Film and Video*, *supra*, note 134, Div. Ct at 67, C.A. at 767. See also *Luscher* at 506 and 508.

In *Ontario Film and Video*, the *Theatres Act*, by authorising the Board to censor "any film," sets no standard and so gives the Board an uncontrolled discretion "to censor or prohibit the exhibition of any film of which it disapproves."[156] The limit would be prescribed by law if the enactment set a standard sufficiently precise to persuade a judge that the discretion granted to the Board is a controlled discretion. For example, a judge may be satisfied if an enactment authorizes a Board of Censors to prohibit the exhibition of a film that is "sexually explicit" or that "exploits violence." In each case the question is whether the standard is sufficiently precise; in each case the answer may vary with the desire of the justice to exercise restraint and deference to legislative decision making or to be activist in order to protect the rights and freedoms.

The rules developed by the justices of the Ontario Divisional Court and the Federal Court of Appeal to govern the prescribed by law requirement, like the rules developed by the justices of the Supreme Court to govern other elements of *Charter* analysis, are not determinative of decision making. Because the rules do not indicate, except in general terms, what degree of certainty is required, judges are free to invoke the rules to justify either judicial restraint or judicial activism.

D. *"Such Reasonable Limits ... As Can Be Demonstrably Justified ...": Purposes, Means and Effects*

The *Oakes* decision indicates that to determine whether a legislative provision that limits a right or freedom is reasonable and demonstrably justified in a free and democratic society, judges are to consider the purposes of the legislative provision, the means used to attain the purposes, and the effects of the limit on the right or freedom.[157] A limit is reasonable and demonstrably justified in a

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[156] Div. Ct at 67.

[157] In the relevant passages in *Oakes*, which are quoted in the text, *infra*, at notes 159, 182 and 191, Dickson C.J. spoke of objective (that is, purpose) and effect in both the singular and plural forms. This perhaps reflects the fact that in *Oakes* the Chief Justice did not focus (continued...)

free and democratic society if the purposes, the means, and the effects are reasonable and demonstrably justified.

The section 1 analysis is not the only stage of *Charter* analysis at which judges must consider the purposes and effects of a challenged enactment. In the first stage of the analysis, judges consider the purposes and effects of the enactment to determine whether the enactment limits a right or freedom. However, at that stage they need not consider purposes and effects fully. If they hold, for example, that one purpose of the enactment is to limit a right or freedom, they need not consider other purposes of the enactment or the effects of the enactment.[158] In the section 1 analysis, judges are required to consider the purposes and effects of the enactment more fully, and to consider the means for the first time. I shall discuss each of these.

1. Purposes

When he discussed the assessment of legislative purpose in *Oakes*, Dickson C.J. did not distinguish between the requirement of reasonableness and the requirement of demonstrable justification. Apparently applying both requirements, he held that judges are to consider two factors when deciding whether the purposes of a limiting enactment are reasonable and demonstrably justified in a free and democratic society. First, are the purposes consistent with the principles of a free and democratic society? Second, are the purposes sufficiently important to justify a limit?

The principal passage in which he developed this rule reads as follows:

> First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R* v. *Big M Drug Mart Ltd.*,

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[157](...continued)
particularly on whether the enactment had more than one purpose, means and effect. When stating or referring to the rules that may be derived from *Oakes*, I speak where appropriate of purposes, means and effects in the plural as judges may identify more than one of each for an enactment. For example, in *Big M*, *supra*, note 1 at 338, the Chief Justice identified two purposes of the enactment under consideration.

[158]See *supra*, text at notes 81 and 87.

> *supra*, at p. 430 C.C.C., p. 366 D.L.R., p. 352 S.C.R. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.[159]

In articulating the two factors that judges should consider when assessing the purposes of a limit, the Chief Justice used several descriptive phrases that are likely to become important elements in the developing jurisprudence. For a limit to come within section 1, the purposes for which the limit is imposed must be:

1. concordant (not discordant) with the principles integral to a free and democratic society,
2. related to concerns which are pressing and substantial in a free and democratic society, and
3. of sufficient importance to warrant overriding a constitutionally protected right or freedom; not trivial.

Two additional descriptive phrases may be added to the three set out above. The purposes of a limiting enactment are reasonable and demonstrably justified in a free and democratic society if they are:

4. collective goals of fundamental importance, and
5. related to the protection of social values of superordinate importance.

The fourth descriptive phrase appears in a passage in *Oakes* in which Dickson C.J. said "[i]t may become necessary to limit rights and freedoms in circumstances where their exercise would be

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[159] *Oakes*, *supra*, note 2 at 227. The passage in *Big M*, *supra*, note 1, to which the Chief Justice referred appears at 366 and reads as follows:

> At the outset, it should be noted that not every government interest or policy objective is entitled to s. 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized then it must be decided if the means chosen to achieve this interest are reasonable -- a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question.

inimical to the realization of collective goals of fundamental importance."[160]

The fifth descriptive phrase appears in *A.G. Nova Scotia* v. *MacIntyre*, a pre-*Charter* decision in which Dickson J., as he then was, held that after a search warrant has been executed, the public is entitled to inspect the warrant and the documents that were used to support the application for the warrant. Dickson J. said "[i]n my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance."[161]

The first of the five descriptive phrases states the first factor to be considered when assessing the purposes of a limit, that is, whether the purposes are consistent with the principles of a free and democratic society. The third and fourth phrases relate to the second factor, that is, the importance of the purposes. The second and fifth phrases appear to relate to both factors.[162]

The rules that Dickson C.J. developed to govern the assessment of legislative purpose in the section 1 analysis, coupled with the rule governing the onus in the section 1 analysis, appear to impose a high standard of justification on government. In order to bring a limit within section 1, government must convince judges that the purposes of the legislative provision are both consistent with the principles of a free and democratic society and important. As in other areas of *Charter* analysis, the rules seem to be conducive to judicial activism and the protection of the *Charter* rights and freedoms. However, there are several considerations which suggest that this is not the case.

Before justices decide whether the purposes of a legislative provision are concordant with the principles of a free and democratic society and sufficiently important to justify a limit of a

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[160] *Oakes*, *ibid.* at 225.

[161] (1982), [1982] 1 S.C.R. 175 at 186-87, 132 D.L.R. (3d) 385 at 403. In *Southam*, *supra*, note 125, MacKinnon A.C.J.O. quoted this passage from the *McIntyre* case at 416, and referred to the phrase "social values of superordinate importance" at 430.

[162] The expression "compelling state interest," used by judges in the United States when applying "strict scrutiny," relates to the importance of the state legislative purposes. For a discussion of the levels of scrutiny in United States equal protection decisions see, *infra*, text at notes 205-13.

right or freedom, they must identify the purposes of the legislative provision. The process of identifying legislative purposes is not a search controlled by clear rules which lead to a single conclusion.[163] The judicial task is not to seek an element contained within the enactment which may be discovered by a careful search; it is rather to impose upon the enactment a theory about the enactment selected by creative choice from among a number of possible theories. Because the process is indeterminate, this is another point in the *Charter* analysis at which judges are not controlled by rules; rather, they are free to use the analysis to select purposes which allow them readily to uphold or invalidate the legislation on the basis of their assessment of its wisdom, or on the basis of their general desire to exercise activism or restraint.

The process of identifying the purposes of a legislative provision is indeterminate for several reasons. Judges may look to different sources in their efforts to identify the purposes. They may look to the legislation itself which may contain a statement of purpose, to commission or committee reports prepared when the legislation was adopted, perhaps to statements made in the legislature, to evidence given by expert witnesses, and to arguments advanced by counsel. A consideration of the enactment itself and of these other sources is likely to suggest not a single purpose but a number of possible purposes. For example, Sunday legislation may be passed for the purpose of enforcing observance of the Christian Sabbath, or for the purpose of imposing a single day of rest.[164] Obscenity legislation may be passed for the purpose of maintaining moral standards, discouraging acts of sexual violence,

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[163]J.W. Torke, "The Judicial Process in Equal Protection Cases" (1982) 9 Hastings Constitutional L.Q. 279 at 292-317. Professor Torke considered United States equal protection jurisprudence in which the formal rules require judges to determine the purposes of a challenged statute and whether the classification used in the statute is rationally related to the achievement of the purposes. Professor Torke argued convincingly that as the choice of purpose is not controlled by rules, "the purpose factor is almost infinitely manipulable." (See 293.) Further, he argued that judges use the broad freedom they have in identifying purpose to give effect to moral values.

[164]See *supra*, text at note 84.

preventing the degradation of women, or preventing the imposition of obscene material on those who find it offensive.[165]

When an enactment and the other sources that judges consider suggest more than one possible purpose, judges are free to proceed along different lines of reasoning. Some may select one purpose as the sole purpose of the enactment; but they may disagree about which purpose to select. Others may select two or more purposes as the purposes of the enactment, again with the possibility that they may disagree about which purposes to select. Judges who select more than one purpose may hold that one of the selected purposes is more important than the others, or that all the selected purposes are of equal importance. Again, there is room for justices to disagree with one another.

Further, judges may state the purposes they select in narrow terms by focusing on the particular provisions of the statute, or in broad terms by abstracting many particulars of the statute.[166] For example, the purpose of the reverse onus provision considered in *Oakes* may be stated narrowly as imposing on persons charged with possession of narcotics for the purpose of trafficking the onus of disproving an intention to traffic after the Crown has established possession.[167] The Chief Justice stated the purpose more broadly as "curbing drug trafficking by facilitating the conviction of drug traffickers,"[168] and more broadly still as "protecting our society from the grave ills associated with drug trafficking."[169]

Accordingly, the process of identifying legislative purposes is indeterminate, and allows judges to select one purpose or several purposes from among a broad range of purposes. Judges who

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[165]See Justice Wilson's discussion of the purposes of obscenity legislation in *Towne Cinema Theatres Ltd.* v. *R.* (1985), [1985] 1 S.C.R. 494 at 524-25, 18 D.L.R. (4th) 1 at 25-27.

[166]See Torke, *supra*, note 163 at 295-99.

[167]In *Oakes*, the justices considered the validity of s. 8 of the Narcotic Control Act, R.S.C. 1970, c. N-1.

[168]*Oakes*, *supra*, note 2 at 228.

[169]*Ibid.* at 229. The broadest statement of the legislative purpose may lead more readily than the narrower statements to the conclusion that the purpose is sufficiently important to bring the limit within s. 1.

disagree with one another in identifying the purposes of a limiting enactment, determining which of several purposes are most important, or determining the level of generality at which the purposes are to be stated may on any one of these grounds alone reach different conclusions on the question whether the purposes are concordant with the principles of a free and democratic society and sufficiently important to warrant a limit on a right or freedom.

The leeway justices have in identifying the purposes of a limiting enactment is increased by a doctrinal feature of the section 1 analysis. In *Oakes*, Dickson C.J. held that elements of the section 1 analysis may be obvious or self-evident.[170] If this is applied to the determination of purpose in a case in which the government advances no evidence of purpose, judges wishing to uphold a limit on a right or freedom may speculate about the purposes of the limit, supply a purpose and determine that the purpose supplied serves to bring the limit within the protection of section 1.[171]

It is arguable that the broad discretion individual judges have in identifying purposes may be reduced if rules governing the process are devised. It is not likely, however, that the discretion may be eliminated as a significant factor in decision making. So far, at least, few rules of this sort have been developed. Two rules should be mentioned. In *Big M*, Dickson C.J. held that in the first stage of *Charter* analysis, when judges consider purpose to determine whether an enactment limits a right or freedom, the relevant purpose is the legislature's purpose at the time the legislation was passed, not at the time of the litigation.[172] Presumably, a similar rule will be adopted for the identification of purpose in the section 1 analysis. Dickson C.J. reasoned that the "shifting purpose" approach, under which legislative purposes are deemed to change as social conditions change, creates uncertainty and encourages re-litigation because it permits judges to hold an enactment valid at one time and invalid at a later time on the basis of "a revised

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[170] *Ibid.* at 227. See *supra*, text at note 141.

[171] *Cf.* Torke, *supra*, note 163 at 307.

[172] *Supra*, note 1 at 352-53.

judicial assessment of purpose."[173] On the other hand it is arguable that the "shifting purpose" approach leads to greater relevance and economy in *Charter* adjudication. It seems wasteful to have judges strike down a limiting provision on the ground that its original purposes do not bring it within section 1, and later uphold the provision, if it is re-enacted, on the ground that its current purposes do bring it within section 1.[174]

In *Big M*, Dickson C.J. developed a second rule respecting identification of purpose. He held, and Wilson J. agreed, that in the section 1 analysis, government may not rely upon a purpose for a limiting enactment that is an *ultra vires* purpose in the context of the federal division of powers.[175] Applying this rule in the section 1 analysis in *Big M*, Dickson C.J. rejected the federal government's argument that the purpose of section 4 of the *Lord's Day Act*[176] is to impose a universal day of rest, because the section would be invalid as federal legislation if that were its purpose.[177]

After justices identify the purposes of a limiting enactment they must determine whether the purposes are concordant with the principles of a free and democratic society and sufficiently important to warrant the limit.[178] These two requirements may perhaps be understood as applications of the section 1 standard of justification that the Chief Justice developed in *Oakes*.[179] The standard of justification requires that a limit of a right or freedom be measured against the "values and principles essential to a free and democratic society." These values and principles include respect for human dignity, social justice, equality, diversity of beliefs, cultural and group identity, and the institutions of participatory democracy.

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[173] *Ibid.* at 352.

[174] See *supra*, text at notes 78-80.

[175] *Supra*, note 1 at 366-67 and 373.

[176] *Supra*, note 17.

[177] See *supra*, text at note 117.

[178] See *supra*, text at note 159.

[179] See *supra*, text at notes 123-24.

The requirement that the purposes of a limiting enactment must be concordant with the principles of a free and democratic society is a direct application of the standard of justification; that is, it directly measures the legislative purposes against the values and principles of a free and democratic society. The second requirement, that the purposes must, in addition, be important, seems to give additional protection to the values and principles of a free and democratic society.[180]

Judges have considerable leeway in determining whether the purposes of a limiting enactment are concordant with the principles of a free and democratic society for the same reasons that they have leeway in applying the standard of justification generally. First, the principles are stated in general terms and so their meanings are not precise. Second, because there are several principles, a legislative purpose may be concordant with some of the principles and discordant with others. Whether justices hold that a legislative purpose is concordant with the principles of a free and democratic society depends on which values and principles they emphasize and how they define those values and principles.[181] Therefore, two justices considering the same legislative purpose may disagree on the issue whether the purpose is concordant with the principles of a free and democratic society.

Similarly, judges have discretion in determining whether the purposes of a limiting enactment are sufficiently important to justify a limit of a right or freedom. The rules developed by Chief Justice Dickson speak of "sufficient" and "fundamental" importance, and "pressing and substantial" concerns. These expressions do not contain standards which control decision making by justices in individual cases. Two justices considering the same legislative purpose may disagree on the issue whether the purpose is sufficiently important to justify a limit on a right or freedom.

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[180]Query whether in terms of doctrine it is helpful to relate the first requirement to reasonableness and the second to demonstrable justification. This defines reasonableness as concordance with the principles of a free and democratic society. In stating the standard of justification, the Chief Justice did not suggest that the values and principles of a free and democratic society are related to reasonableness rather than demonstrable justification.

[181]See *supra*, text at note 126.

I conclude that the rules governing the identification and assessment of legislative purposes in the section 1 analysis do not require justices to engage in judicial activism in *Charter* adjudication. The rules are indeterminate and do not control decision making in individual cases. Judges relying on the same rules may reach contradictory conclusions when they identify the purposes of a limiting enactment, and when they consider whether the purposes identified comply with the requirements necessary to bring the limit within section 1. Judges may use the indetermination in the rules to give effect to their policy preferences and their views about the desirability of judicial activism or restraint.

2. Means

In *Oakes*, Dickson C.J. developed what he called "a form of proportionality test" which judges are to apply when deciding whether the means used in a limiting enactment are reasonable and demonstrably justified in a free and democratic society. The proportionality test contains three components. The Chief Justice began his discussion of the test with the suggestion that it relates wholly to the assessment of means. However, his elaboration of the test indicates that the first two components relate to the assessment of the means used in a limiting enactment, and the third component relates to the assessment of the effects of the enactment on a right or freedom. He stated the first two components in the following terms:

> ... once a sufficiently significant objective is recognized, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R* v. *Big M Drug Mart Ltd.*, *supra*. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R.* v. *Big M Drug Mart Ltd.*, *supra*...[182]

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[182] *Oakes*, *supra*, note 2 at 227. The passage in *Big M* to which Dickson C.J. referred is quoted in note 159, *supra*.

Although the Chief Justice held that the test to determine whether the means comply with the section 1 requirements of reasonableness and demonstrable justification contains two components, he did not expressly relate one component to reasonableness and the other to demonstrable justification. In terms of doctrine it is arguable (and judges may later hold) that the first component relates to reasonableness because it requires a rational connection between purposes and means, and that the second component relates to demonstrable justification because it stipulates that the means must meet a standard higher than mere rationality.[183]

If the first component of the proportionality test relates to the section 1 requirement of reasonableness, it may be stated as follows: for a limit on a right or freedom to be reasonable, the means used to achieve the legislative purposes must be reasonable. The means are reasonable if they are "carefully designed to achieve the objective" or "rationally connected to the objective"; they must not be "arbitrary, unfair or based on irrational considerations."

If the second component of the proportionality test relates to the requirement of demonstrable justification, it may be stated as follows: for a limit to be demonstrably justified in a free and democratic society, the means used must be the least restrictive means, that is, the means that achieve the legislative purposes with the least possible restriction on the rights and freedoms. If it is possible to achieve the legislative purposes by using alternative means that impose a lesser restriction on the right or freedom, then the alternative means, not the means actually used in the legislation, are the demonstrably justified means.

In his statement of the first two components of the proportionality test, the Chief Justice did not hold explicitly that the means used in a limiting enactment must be consistent with the values and principles of a free and democratic society. This may be implicit because the standard of justification in the section 1 analysis imposes this requirement.[184] The Chief Justice did make specific

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[183]See *infra*, text at note 214.

[184]See *supra*, text at notes 123-24.

reference to this requirement in his discussion of purposes[185] and effects;[186] justices in future cases may explicitly rule that this requirement of the section 1 standard of justification applies to the assessment of means as well.

Like the rules governing the assessment of purposes, the rules that Dickson C.J. developed to govern the assessment of means, coupled with the rule governing onus in the section 1 analysis, appear to impose a high standard of justification on government. The rules require government to show that the means used in a limiting enactment are rationally related to the achievement of the legislative purposes, that they impose a lesser restriction on the right or freedom limited than any other means that might have been used to achieve the purposes, and (probably) that they are consistent with the values and principles integral to a free and democratic society. The rules seem to require judicial activism and to give a broad protection to the *Charter* rights and freedoms. However, I argue here, as I do with respect to other elements of the *Charter* analysis, that the rules developed to govern the assessment of means are indeterminate. They mandate neither activism nor restraint. Judges may manipulate the rules to give effect to their policy preferences and their views about the desirability of judicial activism or restraint.

The rule that the means used in a limiting enactment must be rationally related to the purposes of the enactment is indeterminate for several reasons. First, whether means and purposes are rationally related depends in part on what the purposes of the limiting enactment are.[187] I argue above[188] that judges have considerable leeway in selecting the purposes of an enactment. If two judges identify different purposes, one may hold

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[185] See *supra*, text at notes 159 and 178-81.

[186] See *infra*, text at notes 202-203.

[187] For this reason Professors Torke and Linde reject Professor Gunther's view that judges may reduce the scope of value judgement in judicial review of equal protection cases by focusing on means instead of purposes. See Torke, *supra*, note 163 at 284-85 and 323; Linde, *supra*, note 80 at 203-04, 207-13 esp. 208. And see G. Gunther, "Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection" (1972) 86 Harv. L.R. 1 at 21-23.

[188] *Supra*, text at notes 163-69.

that the means are rationally related to the achievement of the purpose she/he identified, and the other may hold that the means are not rationally related to the achievement of the purpose she/he identified. Accordingly, a judge wishing to show deference to legislatures, and a judge wishing actively to protect the rights and freedoms may disagree in their assessment of means for the sole reason that earlier in the analysis they disagreed in their identification of legislative purpose.

Further, the rule that means must be rationally related to purposes is indeterminate because the meaning of the rationality requirement is not clear. A judge who wishes to exercise restraint may take the view that government may satisfy the requirement by showing only that the legislature had a rational basis, for example, the opinion of experts, for concluding that the means will achieve the legislative purposes. An activist judge may hold that government must demonstrate that the means will in fact likely achieve the purposes, or that the means will in fact necessarily achieve the purposes. Further, if rules are developed to clarify the meaning of the rationality requirement, judges may still disagree with one other in the application of the requirement. For example, judges may disagree whether the expert opinion on which the legislature relied provides a rational basis for the belief that the means will achieve the legislative purposes; or whether on the facts of a particular case the means will likely or necessarily achieve the legislative purposes.[189]

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[189] In *Oakes, supra*, note 2 at 229-30, Dickson C.J. held that the means used to achieve the legislative objective are not rational. Section 8 of the *Narcotic Control Act, supra*, note 167, provided that in a prosecution for possession of a narcotic for the purpose of trafficking, if the court finds that the accused had possession, the accused has the onus of establishing that the possession was not for the purpose of trafficking. Dickson C.J. held that the section limits the right guaranteed by s. 11 of the *Charter* to be presumed innocent, and that the reverse onus is not "rationally related to the objective of curbing drug trafficking." He said at 229, "... it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics."

On the other hand, one might argue that the section, although a limit on the right to be presumed innocent, is not irrational as the presumption is rebuttable; and that the means are rationally related to the achievement of one of the purposes identified by the Chief Justice at 228, "curbing drug trafficking by facilitating the conviction of drug traffickers." On this view, the possibility that the section may also facilitate the conviction of simple possessors on charges of possession for the purpose of trafficking, indicates not that the means are irrational but that they are not the least restrictive means. This analysis, while leading to the same result as that reached in *Oakes*, suggests that in *Oakes* itself judges might have differed from one

(continued...)

The rule that the means used in a limiting enactment must be the least restrictive means is also indeterminate. Judges wishing to defer to legislatures and judges wishing to protect the rights and freedoms may differ in their assessment of which of two alternative means is the least restrictive. Where judges agree that the means used in the enactment are more restrictive than an alternative means that might have been used, they may differ on the question whether the alternative means will achieve the legislative purposes.

Finally, if judges adopt a rule that the means used in a limiting enactment must be consistent with the values and principles integral to a free and democratic society, this rule too is not determinative of decisions. This rule derives from the section 1 standard of justification. Judges may disagree with one another when they apply the standard of justification to the assessment of means for the same reasons that they may disagree with one another when they apply the standard at other points in the section 1 analysis: the meaning of the standard depends in any particular case on which of several values and principles the justices emphasize and on how they define those values and principles.[190]

I conclude that the rules governing the assessment of means in the section 1 analysis are indeterminate. Therefore, judges may manipulate the rules in particular cases to support either the conclusion that the means are reasonable and demonstrably justified or the conclusion that they are not reasonable and demonstrably justified. Judges may use the leeway they derive from the indetermination of the rules to give effect to their policy preferences and their views about the desirability of judicial activism or restraint.

3. Effects

The assessment of the effects of a limiting enactment in the section 1 analysis is governed by the third component of the

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[189](...continued)
another on the question whether the means are rationally related to the achievement of the legislative purpose.

[190]See *supra*, text at notes 126 and 181.

proportionality test developed by the Chief Justice in *Oakes*. The Chief Justice stated the third component in the following terms:

> Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance."
>
> With respect to the third component, it is clear that the general effect of any measure impugned under section 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to section 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.[191]

The rule stated in the third component is that judges are to assess the effects of a limiting enactment by determining whether there is a "proportionality" between the severity of the effects of the enactment on a right or freedom and the importance of the purposes which the legislature intended to achieve through the enactment. The search for proportionality is a search for a proper relationship, a balance, between effects and purposes. "The more severe the deleterious effects .., the more important the objective must be ..." for the limiting enactment to be upheld under section 1. If judges hold that the injurious effects of the enactment on the right or freedom are too severe to be justified by the importance of the purposes, or that the purposes are not sufficiently important to justify the severity of the effects, they are to rule that the limit is not preserved by section 1, notwithstanding their ruling earlier in the section 1 analysis that the purposes and means satisfy the tests necessary to bring the limit within section 1.

Like the rules governing the assessment of legislative purposes and means in the section 1 analysis, the test developed by the Chief Justice to govern the assessment of effects appears to impose a high standard of justification on government. Judges are

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[191] *Supra*, note 2 at 227-28.

to apply the third component after they determine that both the purposes of the limiting provision and the means used to achieve the purposes are reasonable and demonstrably justified in a free and democratic society. When they apply the third component, judges may hold that, despite those determinations, the limit is not within section 1. It appears that the test, because it may exclude from section 1 a limit which on all other tests is within section 1, may operate only against government and never in favour of government. Therefore, the test seems to mandate judicial activism and the protection of the *Charter* rights and freedoms. I argue, however, that this is not the case.

Analytically, the process by which judges are to assess the effects of a limiting enactment contains three steps. First, judges must identify and assess the importance of the purposes of the enactment. Second, they must identify and assess the severity of the effects of the enactment on the right or freedom limited. Third, they must determine whether there is an appropriate balance between the importance of the purposes and the severity of the effects. I argue that the judges' decisions at each step of this process are not controlled by determinative rules. Therefore, judges have considerable leeway when they assess the effects of a limiting enactment, and they may use this leeway to justify either activism or restraint.

First, justices have considerable leeway when they identify the purposes of the limiting enactment and assess the importance of the purposes. The justices are not actually required to undertake the inquiry into purposes at this stage of the analysis as they do so at the beginning of the section 1 analysis when they consider whether the purposes are reasonable and demonstrably justified in a free and democratic society.[192] When I discuss that part of the section 1 analysis, I argue that the rules governing the inquiry into legislative purposes are indeterminate.[193] As the outcome of the

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[192]See *supra*, text at notes 159-81. The justices may also consider purposes at the first stage of *Charter* analysis to determine whether the impugned enactment imposes a limit on a right or freedom. However, judges who hold that an effect of the enactment is to limit a right or freedom may not consider the purposes of the enactment at the first stage of *Charter* analysis. See, *supra*, text at notes 72-86.

[193]See *supra*, text at notes 163-81.

enquiry into purposes is an essential element of the assessment of effects under the third component of the proportionality test, the assessment of effects is also characterized by indetermination and judicial freedom in decision making.

Second, justices have considerable leeway in decision making when they identify the effects of a limiting enactment and assess the severity of the effects on the right or freedom limited. Judges undertake their most thorough analysis of the effects of a limiting enactment at this stage of *Charter* analysis, although they may consider effects to some extent both in the first stage of *Charter* analysis and earlier in the section 1 analysis. In the first stage of *Charter* analysis, they may consider effects to determine whether an enactment limits a right or freedom. However, they may not consider effects at all at that stage if they hold that a purpose of the enactment is to limit a right or freedom.[194] If judges do consider effects at that stage, and if they adopt a "substantial effects" rule, they may consider whether the enactment affects a right or freedom "substantially."[195] That inquiry is similar to the inquiry into the severity of effects that judges undertake when they assess effects under the third component of the proportionality test. However, the purposes of the two inquiries are different. In the first stage of *Charter* analysis judges ask whether the effects of the enactment on the right or freedom are so substantial that they warrant a holding that the enactment limits the right or freedom. In the section 1 analysis judges ask whether the effects are so severe that, when balanced against the purposes of the enactment, they warrant a holding that the limit does not come within section 1.

Judges may also consider effects earlier in the section 1 analysis when they determine whether the means used in a limiting enactment are the least restrictive means.[196] This determination touches on the severity of the effects of the enactment because the means used determine how severely the enactment affects the right

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[194] See *supra*, text at notes 72-81 and 87-97.

[195] See *supra*, text at notes 91-97.

[196] See *supra*, text following note 183.

or freedom. However, the concern at that stage of the analysis is not to balance effects against purposes, but to inquire whether the means used in the enactment produce a more severe effect on the right or freedom than an alternative means might produce.

When I discuss the judges' consideration of effects in the first stage of *Charter* analysis to determine whether an enactment limits a right or freedom, I argue that the processes by which judges identify the effects of an enactment and assess the "substantiality" (severity) of the effects are complex and indeterminate.[197] As the identification of effects and the assessment of their severity is an essential element of the assessment of effects under the third component of the proportionality test, the assessment of effects is also characterized by indetermination and judicial freedom in decision making.

In his articulation of the third component of the proportionality test, the Chief Justice indicated three factors that judges should consider when assessing the severity of the effects of a limiting enactment. These factors are (1) "the nature of the right or freedom violated," (2) "the extent of the violation," and (3) "the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society."[198] I argue that these factors are indeterminate and do not control the judicial assessment of the severity of the effects of a limiting enactment.

The first factor the Chief Justice directed judges to consider when assessing the severity of effects is "the nature of the right or freedom violated." This suggests that some rights and freedoms or some classes of rights and freedoms[199] are to be "preferred" in the sense that when an enactment limits these rights and freedoms judges are to hold more readily than they do when an enactment limits other (non-preferred) rights and freedoms that the effects of the limit are severe. The result of a judicial readiness to hold that the effects are severe when an enactment limits a preferred right or

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[197] *Supra*, text at notes 87-94.

[198] *Supra*, text at note 191.

[199] The *Charter* identifies several classes of rights and freedoms - fundamental freedoms in s. 2, democratic rights in ss 3-5, mobility rights in s. 6, legal rights in ss 7-14, equality rights in s. 15, official language rights in ss 16-22, and minority language educational rights in s. 23.

freedom is that judges will be less likely to hold that the purposes of the enactment are sufficiently important to achieve the proportionality necessary to bring the limit within section 1. In this way, judges may give greater protection to preferred rights and freedoms than to non-preferred rights and freedoms by subjecting limits of preferred rights and freedoms to a high level of scrutiny[200] in the section 1 analysis.

Whether the Chief Justice intended to draw this sort of distinction between preferred rights and freedoms and non-preferred rights and freedoms, and whether doctrine develops to elaborate such a distinction must await further decisions. Here I note that the direction to judges to consider "the nature of the right or freedom violated" does not control the judicial assessment of the severity of effects because (at least at present) there are no rules to indicate which rights and freedoms or classes of rights and freedoms are to be "preferred."

The second factor the Chief Justice directed judges to consider when assessing the severity of effects is "the extent of the violation." This factor does not render the assessment of effects determinate because it is tautological; that is, it directs judges to assess the severity of the effects by considering the severity of the effects. This factor does not contain a standard by which to measure the magnitude of an injurious effect on a right or freedom. In this respect it is like the rule requiring judges to determine whether legislative purposes are "sufficiently important" to justify a limit,[201] which does not contain a standard by which to measure the importance of the purposes. Neither rule controls decision making by judges in individual cases.

The third factor the Chief Justice directed judges to consider is "the degree to which" the limit "trench(es) upon the integral principles of a free and democratic society." This suggests that when a limiting enactment impairs a principle considered integral to a free and democratic society, judges are to hold more readily than they do in other cases that the effects of the limit are severe. As a result, judges will be less likely to hold that the

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[200] See *infra*, text at notes 205-13 and 217.

[201] See *supra*, text following note 181.

purposes of the enactment are sufficiently important to achieve the proportionality necessary to bring the limit within section 1. In this way, judges may give a high degree of protection to principles considered integral to a free and democratic society by subjecting limits which impair these principles to a high level of scrutiny[202] in the section 1 analysis.

The direction to judges to consider the degree to which a limit impairs the integral principles of a free and democratic society is an application of the section 1 standard of justification. The direction does not control the assessment of the severity of the effects of a limit for the same reasons that the standard of justification does not control decisions at other points in the section 1 analysis. A limit may affect some principles integral to a free and democratic society negatively and others positively. A determination that a limit impairs these principles, like the application of the standard of justification generally, depends on which of several principles the justices emphasize and on how they define those principles.[203]

Third, justices have considerable leeway when they balance the importance of the purposes of a limit against the severity of the effects of the limit on a right or freedom. The direction to balance these factors contains no indication of the matters judges should consider in the balancing process; it contains no standard to control the way in which judges strike the balance. The Chief Justice said, "[t]he more severe the deleterious effects of a measure, the more important the objective must be...."[204] It may be that the Chief Justice intended by this statement to encourage judges to engage in judicial activism and to hold that limits that severely affect a right or freedom do not come within section 1. If so, judges wishing to exercise restraint and to uphold limits may in their decisions revise the statement to read, "the more important the objective is, the more severe the deleterious effects may be." Actually, it is not necessary for restrained judges to revise the statement of the Chief

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[202]See *infra*, text at notes 205-13 and 218.

[203]See *supra*, text at notes 126, 181 and 190.

[204]*Supra*, text at note 191.

Justice. Both activist judges and restrained judges may invoke the statement in its present form. Activist judges may hold that however important the purposes are, the effects on the right or freedom are so severe that the two are not proportional and the limit is not preserved by section 1. Restrained judges may hold that however severe the effects are, the purposes are so important that the two are proportional and the limit is preserved by section 1.

I conclude that the rules governing the assessment of the importance of purposes, the assessment of the severity of effects, and the balancing of purposes and effects are indeterminate. As judges may disagree with one another when they apply these rules, they may disagree on the question whether the effects of a limit are reasonable and demonstrably justified. Judges may use the indetermination of the rules to give effect to their policy preferences and their views about the desirability of judicial activism or restraint.

E. *Section 1 and Levels of Scrutiny*

In their approach to section 1, the justices of the Supreme Court of Canada developed doctrine which on its face suggests that they intended to embrace judicial activism in order to protect the *Charter* rights and freedoms, that they intended to encourage lower court judges to adopt a similar position, and that they intended to insist on a high standard of justification in order to make it difficult for government to salvage a limit by bringing it within section 1. The elements of the section 1 analysis which point in this direction are the following:

1. the presumption that a limiting enactment is unconstitutional; that is, the presumption that a limit does not come within section 1;

2. the heavy onus on government of persuading judges that a limit comes within section 1;

3. the rule that for a limit to come within section 1 the purposes of the limiting enactment must be very important and concordant with the principles of a free and democratic society;

4. the rule that for a limit to come within section 1 the means used to achieve the purposes must be the least restrictive means; and

5. the rule that for a limit to come within section 1 the effects of the limit on the right or freedom must be proportional to the importance of the purposes of the limiting enactment.

Notwithstanding these indications of activism in the doctrine of the section 1 analysis, I attempt to show that the doctrine does not control decision making and may be used by justices to support either activism or restraint. I recognize, nevertheless, that the justices might have developed quite different doctrine for the section 1 analysis, albeit doctrine which itself would not be determinative of decision making. If the justices wished to signal that they intended to be restrained in their approach to *Charter* adjudication and to defer to the legislative will, and if they wished to make it easy for government to salvage a limit by bringing it within section 1, they might have developed doctrine with the following features:

1. a presumption that a limiting enactment is constitutional; that is, a presumption that a limit comes within section 1;

2. an onus on the party relying on the *Charter* of showing that a limit does not come within section 1;

3. a rule that for a limit to come within section 1, it is sufficient that the purposes of the limiting enactment are rational;

4. a rule that for a limit to come within section 1, it is sufficient that the means used in the enactment are rationally related to the achievement of the purposes, and

5. no rule requiring a proportionality between purposes and effects.

The differences between the section 1 doctrine that the justices developed and the alternative doctrine that I suggest may be compared with the differences between the highest and lowest levels of scrutiny that judges in the United States have developed in equal protection jurisprudence. Judges in the United States have developed three approaches to judicial review of legislation under the equal protection clause: low scrutiny, intermediate scrutiny, and

high or strict scrutiny.[205] The three levels of scrutiny embody three standards of justification. The notion is that judges apply low scrutiny in the general run of equal protection cases because they wish to exercise judicial restraint and show deference to legislative decisions.[206] Judges apply strict scrutiny in cases where the challenged legislation denies to those whom it affects a right considered to be constitutionally "fundamental," or where the legislation discriminates among people on the basis of a classification considered to be "suspect," such as race.[207] Judges apply strict scrutiny in these cases because they wish to prohibit the legislative denial of the fundamental right or the legislative use of the suspect classification. Judges apply intermediate scrutiny in cases where the challenged legislation affects interests considered to be "important" but not "fundamental," or where the legislation uses a classification considered to be "sensitive" but not "suspect," such as gender.[208]

Strict scrutiny is characterized by features similar to those which characterize the doctrine developed by the justices of the Supreme Court of Canada for the section 1 analysis.[209] Almost invariably, when United States judges use strict scrutiny they invalidate the challenged abridgement of the equal protection clause.[210] Low scrutiny is characterized by features similar to those which characterize the alternative doctrine I set out above.[211] Almost invariably, when United States judges use low scrutiny they

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[205]L.H. Tribe, *American Constitutional Law*, (Mineola, N.Y.: Foundation Press, 1978) at 991-1000 (low scrutiny), 1000-60 (strict scrutiny) and 1057-97 (intermediate scrutiny). Torke, *supra*, note 163 at 282-84. Dickson C.J. referred to the "two standards of equal protection review" in the United States in his dissenting decision in *Gay Alliance*, *supra*, note 56 at 595.

[206]Tribe, *ibid.* at 995-96.

[207]*Ibid.* at 1000-02 and 1012.

[208]*Ibid.* at 1089-90.

[209]Torke, *supra*, note 163 at 282-83.

[210]Tribe, *supra*, note 205 at 1000, 1045, 1082, and 1089.

[211]Torke, *supra*, note 163 at 282.

uphold the challenged abridgement of the equal protection clause.[212] Intermediate scrutiny is characterized by features which are not as demanding as those of high scrutiny but not as relaxed as those of low scrutiny.[213] When United States judges use intermediate scrutiny the results are mixed; they uphold the legislation in some cases and invalidate it in others.

Is it likely that Canadian judges will, as a formal doctrinal matter, use different levels of scrutiny under section 1 of the *Charter* as United States judges do under their Bill of Rights? A possible textual basis in the *Charter* for the adoption of different levels of scrutiny is the reference in section 1 to both reasonableness and demonstrable justification in a free and democratic society. In *Oakes*, Dickson C.J. said little about the relationship between the requirement of reasonableness and the requirement of demonstrable justification. However, his invocation of the words "demonstrably justified" to support his ruling that in section 1 there is a heavy onus of proof on the party seeking to limit,[214] seems to suggest that demonstrable justification sets a higher standard than does reasonableness. If that is so, the requirement of reasonableness may point to low scrutiny, and the requirement of demonstrable justification may point to strict scrutiny. Accordingly, if reasonableness and demonstrable justification were alternative requirements in section 1, justices might develop two standards of justification similar to low scrutiny and strict scrutiny in United States jurisprudence. Further, justices might develop rules to determine when to apply each approach, that is, to determine what sorts of limits may come within section 1 as long as they are reasonable, and what sorts of limits may come within section 1 only if they meet the higher standard of demonstrable justification. If the two requirements were alternatives, Canadian judges would be in a position similar to that of judges in the United States when they apply low scrutiny to some sorts of limits and strict scrutiny to other sorts of limits.

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[212] Tribe, *supra*, note 205 at 1082 and 1089.

[213] *Ibid.* at 1082-89; Torke, *supra*, note 163 at 283.

[214] See *supra*, text at notes 137-38.

However, the language of section 1 makes this sort of development unlikely. In section 1, reasonableness and demonstrable justification are cumulative not alternative requirements. To hold that a limit comes within section 1, justices must hold that it is both reasonable and demonstrably justified in a free and democratic society. Accordingly, it is unlikely that justices will ground the adoption of two levels of scrutiny or standards of justification in the section 1 requirements of reasonableness and demonstrable justification.

Canadian judges may, however, use the balancing of legislative effects and purposes that is required by the third component of the proportionality test,[215] as the functional equivalent of the levels of scrutiny in the United States. Indeed, judges may use this balancing process to achieve a "sliding scale of review," that is, an infinite number of levels of scrutiny instead of only three, a position that some justices and scholars in the United States favour.[216]

Judges may subject certain types of limits to a high level of scrutiny by holding readily that the effects of these limits are severe, and that the purposes of the enactments containing these limits are not sufficiently important to be proportional to the effects. The result of this reasoning is that these limits do not come within section 1. Using this technique, judges may apply a high level of scrutiny to limits on preferred rights and freedoms or preferred classes of rights and freedoms,[217] and to limits which impair a principle considered integral to a free and democratic society.[218] For example, (to borrow from the United States jurisprudence) judges may apply a high level of scrutiny to limits which deny to a class of persons a right considered to be "fundamental," and to limits which affect persons identified by a classification considered to be "suspect," by holding either that equality rights are preferred rights,

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[215]See *supra*, text at notes 191-204.

[216]Torke, *supra*, note 163 at 283.

[217]See *supra*, text at notes 199-200.

[218]See *supra*, text at notes 202-203.

or that these limits impair a principle integral to a free and democratic society. Judges may say of these limits that their effects on the right or freedom limited are so severe that they are not warranted by any legislative purposes.

Finally, a comment on the words "reasonable" and "demonstrably justified" in section 1, and the relationship between the two. First, each is an open-ended, general word capable of many interpretations. The words are indeterminate and do not control judicial decision making. As I suggest above,[219] justices might have used the two words to develop section 1 doctrine quite different in formal terms from the section 1 doctrine developed by the Chief Justice in *Oakes*. Second, although the Chief Justice did not examine at length the relationship between reasonableness and demonstrable justification in *Oakes*, he seemed to suggest that reasonableness imposes a lower standard of justification than does demonstrable justification.[220] Third, "reasonableness" seems to be included within "demonstrable justification." Judges may hold that a limit is "reasonable" but not "demonstrably justified"; however, a holding that a limit is "demonstrably justified" seems to presuppose that it is "reasonable." For example, a holding that the means used in a limiting enactment are the least restrictive means that achieve the legislative purposes presupposes that the means are rationally related to the achievement of the legislative purposes.[221]

This overlap between reasonableness and demonstrable justification may be the reason that judges, on occasion, treat the two as if they were one requirement. For example, in *Oakes*, the Chief Justice did not distinguish between the two requirements when he discussed the factors judges should consider when determining whether the purposes of a limiting enactment are reasonable and demonstrably justified.[222] In the same decision, when the Chief Justice discussed the assessment of the means used

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[219]See *supra*, text preceding note 205.

[220]See *supra*, text at note 214.

[221]See *supra*, text at notes 182-83.

[222]See *supra*, text preceding note 159.

in a limiting enactment, although he isolated two factors, the first and second components of the proportionality test, he did not explicitly relate one to reasonableness and the other to demonstrable justification.[223] In the *B.C. Motor Vehicle Reference*, Lamer J. seemed to treat the two requirements as one by integrating the word "reasonable" and the expression "demonstrably justified in a free and democratic society." He said that the limiting enactment considered in that decision comes within section 1 only if it is "in a free and democratic society, under the circumstances, a justified reasonable limit to one's rights under section 7."[224] In the same decision, Lamer J. spoke of "a reasonable limit in a free and democratic society."[225]

Notwithstanding the overlap between reasonableness and demonstrable justification, judges may use the reasonableness requirement alone. Judges may hold that the evidence and argument necessary to support a finding that a limit is reasonable may be less extensive than the evidence and argument necessary to support a finding that a limit is demonstrably justified. For example, judges may wish to examine parliamentary reports or the evidence of expert witnesses on the latter issue, but not on the former. If they determine that a limit fails to meet the lower standard of reasonableness, they may hold that the limit does not come within section 1 without undertaking what they may consider to be the more complex analysis necessary to determine whether the limit meets the higher standard of demonstrable justification. In *Oakes* the Chief Justice relied on the reasonableness requirement alone to assess the means used in the enactment. He held that the means (a reverse onus clause requiring an accused found to be in possession of drugs to prove that he/she was not in possession for the purpose of trafficking) are not rationally related to the achievement of the

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[223] See *supra*, text at note 183.

[224] *Supra*, note 9 at 515. In *Southam*, *supra*, note 125, MacKinnon A.C.J.O. at 425 spoke of determining whether a limit "has been demonstrably justified as a reasonable one"; and at 430 he concluded that the appellant "has not demonstrably justified the limit imposed by s. 12(1) as a reasonable one in this free and democratic society...."

[225] *B.C. Motor Vehicle Reference*, *ibid.* at 521.

purpose of the legislative provision.[226] Therefore, he held that he did not have to consider whether the means meet the other two components of the proportionality test.[227]

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[226]*Supra*, note 189.

[227]*Supra*, note 2 at 230.